A TRIAL ON TRIAL

THE GREAT SEDITION TRIAL OF 1944

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A TRIAL ON TRIAL
OR
THE GREAT SEDITION TRIAL OF 1944

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December, 1945

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DEDICATION

To the self-sacrificing members of the American Bar, who so ably and gallantly defended that corner-stone of our liberties, freedom of speech, in the Great Sedition Trial at Washington, April 17th to December 7th, 1944, this book is gratefully dedicated.

The Authors:

MAXIMILIAN J. ST.GEORGE

LAWRENCE DENNIS.

S155+

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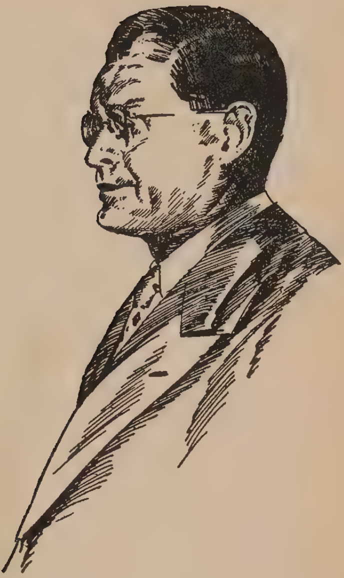

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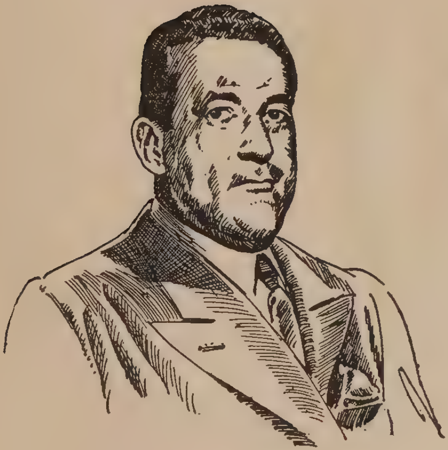

Lawrence Dennis

The Authors.

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WITH LIBERTY AND JUSTICE FOR ALL

FOREWORD

"I'll tell you what ought to be done with those seditionists: half of them ought to be taken out and shot and the other half ought to be locked up in a lunatic asylum. They turned that trial into a farce, killed the trial judge and made a mockery of justice."

Thus pronounced himself a prominent Washington attorney and a former high official in the Department of Justice, discussing the celebrated Sedition Trial with one of the defense attorneys. Thereupon ensued a conversation somewhat as follows:

"You are familiar with the charges in the indictment and the record of the trial, I suppose?" queried this defense attorney.

"Oh, no. I don't know anything about the case except what little I read about it from time to time in the newspapers during the trial and, of course, what I heard around town."

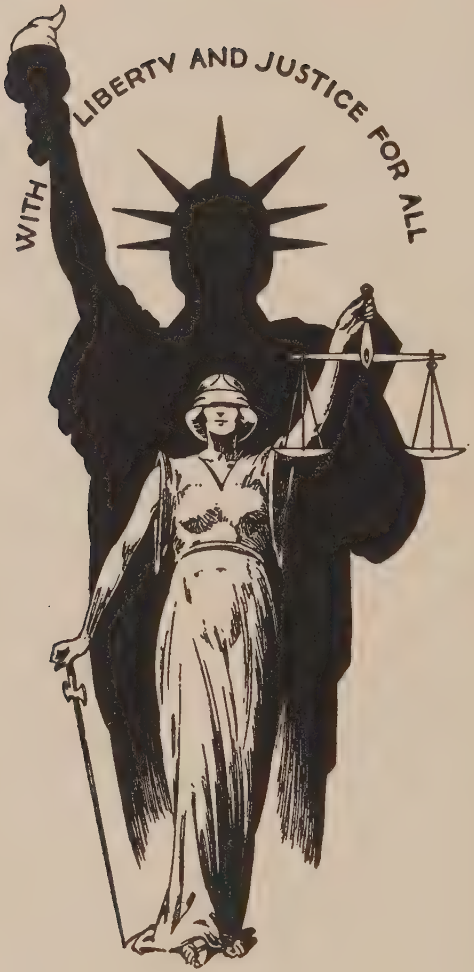
"Well, let me ask you this: do you believe that one of the chief purposes of criminal trial by jury is to determine whether the charges are true or is it your idea of a criminal trial that its function is merely to ratify a popular verdict against the accused who have already been tried and convicted in the newspapers?"

"Certainly, I believe in due process of law. That's just why I say that those blankety-blank seditionists should not have been allowed to turn that trial into a joke. Why, if they had had a tough judge, as they deserved, he would have thrown the lot of them into jail for contempt of court."

"You will admit, won't you, that if the judge had sent all or most of the defendants and their counsel to jail for contempt while the trial was in progress it would have been a rather sorry performance from the point of view of upholding the majesty of the law?"

"Look here, I believe in 100% Americanism and the maintenance of the dignity of our courts. As I see it, these damn crackpots and their lawyers were un-American and made a joke of a criminal trial!"

"Knowing you as well as I do, I am prepared to take your word for it that you are a 100% American and against all subversive elements. But I am going to ask you a simple question: Do you believe in lynching?"


WITH LIBERTY AND JUSTICE FOR ALL

"Naturally, I believe in one law for all and equal justice for all."

"Of course I don't believe in lynching."

"Well, let me ask you another question: Do you believe that there should be one law for the good people and another law for the bad people?"

"Naturally, I believe in one law for all and equal justice for all."

"Do you believe that the end justifies the means?"

"Well, I guess I don't, if you put it that way. But, what the devil are you trying to do by your cross-examination? Back me into a corner?"

"No, what I am trying to do is to make you, an intelligent public spirited lawyer, see that the things you cherish in America can only be preserved by observing equal justice or a single standard for all, and not by conducting legalized lynching bees for people whom you and I might agree are subversive or un-American. Let me ask you this: Do you realize that calling people names like un-American, subversive, counter-revolutionary, or revolutionary, or Fascist and then trying them on a charge of being a so-and-so is a communist technique and not a practise of American and British jurisprudence?"

"Well, I never thought of the Sedition Trial in connection with Moscow, but I don't think you have any right to insinuate that the Department of Justice under the Roosevelt Administration did not respect civil liberties. On the contrary, I understand that Attorney General Biddle was a zealous civil libertarian and that he did not allow the Department of Justice in this war to repeat the witch hunts that it carried on in the last war."

"I see the Biddle-Department of Justice propaganda about this Administration being a great respecter of civil liberties has done a job on you. Well, I am going to demolish that job with a list of five Supreme Court decisions in which convictions or judgments by the lower courts have been reversed by the Supreme Court on the ground of insufficiency of evidence. Two of those were cases of alleged communists: Schneiderman for denaturalization and Harry Bridges for deportation, and three were cases of alleged pro-Nazis: Hartzel for violation of the wartime Sedition and Espionage Act of 1917, Baumgartner for denaturalization, and the twenty four German-American Bundists for violation of the 1940 Selective Service Act. In all five of these leading civil liberties cases the Department of Justice under the Roosevelt Administration fought the case right up to the Supreme Court. Now how can you seriously contend that a Department of Justice that gets slapped down by the Supreme Court in five leading civil liberties cases within a period of three years, each time on the ground of insufficiency of the evidence, has had a decent regard for civil liberties? The Supreme Court record flatly contradicts your claim and the Department of Justice propaganda. Reversals speak for themselves. The reversals were not on grounds of legal technicalities or mistakes on interpretations of the law but on the broad, substantial ground of insufficient evidence. Any good lawyer may err as to the law or take a view of the Constitution and the law with which the Supreme Court may not agree. But it is hard to believe that a Department of Justice, imbued with a deep respect for civil liberties, freedom of speech and freedom of the press, could frame up five different major civil liberties cases against two alleged communists and three alleged Fascists on evidence the Supreme Court had to pronounce insufficient. What have you to say to that?"

"Ahem, I hadn't thought of that."

"Has it ever occurred to you that your class, conservatives, men of wealth and large interests, have far more to fear from legalized lynching than a few unpopular so-called crackpots the administration may seek to make an example of to please certain highly articulate minorities? Don't you realize that there are powerful economic and political minorities in this country, like the communists and certain militant labor unions, which would liquidate you and your kind and the big economic interests behind you, by the simple process of legalized lynchings or conspiracy charges if they could induce the national administration to put the Department of Justice to work framing up a political case against the lot of you? You may not have any use for the defendants in the Sedition Trial, but, if you know what is good for you and your kind, you should realize that you have a lot of use for due process of law and the single standard in the administration of justice. Only the single standard and equal justice before the law stand between your economic kind and the fate of your counter-parts in Soviet Russia at the end of the last war. Don't forget the communists call you and your kind, Fascists, because of your wealth and economic power quite as much as they called the obscure and unimportant defendants in the Sedition Trial, Fascists, because of their anti-communist views and their moral courage to express those views and to criticize in the market place the present administration instead, like yourself and your associates, of criticizing the present administration only in the privacy of your homes and clubs while seeking and obtaining from it large war contracts and profits."

"Aren't you getting a bit personal?"

"Yes, I am. But I want to make you see that your interests and future fate are linked with those of the defendants in the Sedition Trial, whether you like it or not."

"Well, I confess I never thought of myself as being in the same class with those crackpots in the Sedition Trial."

"We lawyers, all but four of the twenty three being court appointed and unpaid, did not think of ourselves as being in the same class with our defendants, but it did not take us long to see that we were fighting primarily for due process and equal justice in that trial for all the people, and not merely for our defendants. Do you imagine that it was to our economic interests to prolong a trial over several months in which we were not getting a penny of compensation?"

"Why did you do it? I hear some of you behaved pretty badly. There were several fines adjudged against the lawyers for contempt were there not?"

"Yes, there were. And I do not propose now to judge the late Chief Justice Eicher, who is no longer alive to defend himself. But I will remind you that the prosecutor got reprimanded by the judge for making propaganda statements about the trial to the reporter of the communist Daily Worker and was admonished not to do it again."

"Well, I know that most of the defendants are a bad lot. They are against our form of government."

"Granting the defendants were against our form of government, which I believe is not true of any of them, that is no crime. There is no law against denouncing our form of government or advocating its change to some other form. The Declaration of Independence is very explicit as to the right of the people "to alter or abolish" any form of government and to institute a new form of government. And the first amendment of the Federal Constitution guarantees to every citizen freedom of speech and of the press. There is a law against trying to change our form of government by force and violence. But our Constitution expressly provides for unlimited change in our form of government."

"Now don't get me wrong. I believe as much as any one in freedom of speech and freedom of the press. And I am not afraid of sedition or seditionists. But I have no use for people who abuse free speech to malign our President, to preach race or class hate, or to undermine the people's faith in their government, its war aims and war administration.''

''Just how could there be any effective opposition to the administration in power if it were a crime to impair the people's confidence in their President, his policies and administration?''

''These seditionists were all playing Hitler's game. That's reason enough for me to be against the lot of them.''

''Well, in a sense, I suppose, they were, all of them, playing Hitler's game in America before Pearl Harbor in that they all wanted to keep America out of the war. Hitler also wanted to keep America out of the war. But that was no crime.''

''These defendants were not only trying to defeat the president's foreign policy before Pearl Harbor but they were in favor of Fascism or Nazism, weren't they?''

''To that question I must answer that during the seven and a half months of the trial I heard no evidence purporting to prove that all these defendants had the same political ideas; about all these defendants, as a whole, had in common was opposition to America's entry into the war. As for National Socialism or Fascism, whatever you may mean by those terms, only some of the half dozen Germans among the thirty defendants could be said ever to have indicated any general acceptance of the doctrines of German National Socialism. And in the cases of the German defendants the evidence showed mainly that they were pro-German, not that they sought to establish National Socialism in America. It may, of course, be argued that any German-American who extolled Nazi Germany was a Nazi. But this does not necessarily follow. It was normal for Germans in this country to be pro-German. And when Germany had a Nazi regime, this necessarily meant being pro-Nazi. It does not follow that any native American who favored American neutrality towards Nazi Germany and who also may have held some of the political and economic views held by the Nazis or some of the prejudices of the Nazis, such as race prejudice or prejudice against communists, was a Nazi. Race prejudice and anti-Semitism, as you well know, have been world-wide since the beginning of history.''

"Well, as I told you at the start, I don't know the facts in this case. I have just given you my opinion as a good American about these subversive elements and the disgraceful way they carried on during that trial."

"Do you happen to know that several of the defendants were veterans of the last war and one, of this war; and that several of them have sons in the armed forces in this war? Do you also know that most, practically all, of the difficulties of this trial were created, not by the defendants, but by their court-appointed and unpaid lawyers?"

"Well, as I already told you, I heard that you lawyers behaved pretty badly."

"If that is how you choose to characterize what we considered the proper defense of our clients, do you think we lawyers were bewitched or corrupted by our clients so to defend them—certainly most of us were not influenced in this respect by any monetary consideration?"

"Well, I guess you have me on my not being familar with the facts of the case and on my not having read the record of this trial, which lasted over a half year."

"Quite so, but before tossing around judgments on the defendants and the behavior of the defendants and their counsel during this trial, don't you think you ought to get the facts straight?"

"How can I? As I told you, all I know is what I read in the papers and heard around town about the trial."

It was the foregoing conversation which suggested the writing of this volume to meet the need of persons like this Washington attorney. The fair minded general public has not the time or the opportunity to study the voluminous court record. The public was never given the true story. The press in covering the trial endeavored on the whole, with a few exceptions, to be fair. But press reports on the trial had to be newsy and, also patriotic, which meant supporting the prosecution as far as possible. Explaining a trial like this is the job of a book and not a series of news stories on the trial. To understand any one phase or feature of the trial it is necessary to understand the trial as a whole. A balanced view of any historical event extending over a period of months must be sought in history books covering the event rather than in contemporaneous news stories about the event while it is in course.

And so the authors offer the reader this factual story of the great Sedition Trial of Washington.

CHAPTER I.

A TRIAL ON TRIAL.

THE MASS Sedition Trial which began in the criminal division of the United States District Court in Washington, D. C. on April 17, 1944 and ended seven and a half months later in a mistrial caused by the death from a heart attack of the trial judge will go down in history as one of the most interesting and instructive political trials of all time. Many of the great political trials of the past derived their historical importance from that of the personalities on trial. Emperors, kings, ministers of state, noble lords, high dignitaries of the church and illustrious men of the professions have been tried and convicted or exonerated in great political trials. The mass Sedition Trial of 1944, however, unlike celebrated political trials of the past, is historically important for a number of reasons, no one of which is the importance of any one or all of the defendants.

One of the most significant features of the Trial was the utter insignificances of the defendants in relation to the great importance which the government sought to give to the Trial by all sorts of publicity-seeking devices, one of which was the staging of the Trial in the nation's capital, where only one of the thirty defendants had been domiciled. During the course of the Trial the prosecutor even went so far in frankness as to complain to a member of the press, the reporter of a communist paper, at that, of a lack of good publicity for the Trial. For this revealing remark, the prosecutor was rebuked from the bench by the Trial judge on the motion of one of the defense attorneys, E. Hilton Jackson.

The Trial made history, but not as the government had planned. It made history as a government experiment which went wrong. It was a Department of Justice experiment in imitation of a Moscow political propaganda trial. As such, the Trial and its farcical failure merit the analysis which it is the purpose of this book to make. The chief questions to be answered are *Why?* and *How?* Why and how did the Trial go wrong?

The Trial might have gone wrong for the government either in a mass acquittal, which everyone on the defense side felt confident of at the time of the trial judge's death; or it might have gone wrong for the government in a reversal of convictions by the Circuit Court of Appeals or the Supreme Court. It is difficult to see how the Supreme Court, which had reversed five leading civil liberties judgments during the present war (by the time this book was being written), two being cases of alleged communists and three being cases of alleged Fascists or pro-Fascists, could possibly have sustained convictions on the type of evidence tendered by the government in the Sedition case. When the Trial ended in a mistrial through the death of the trial judge in the eighth month of the affair, which for him had been an ordeal and for the general public a farce, the government was still not half way through the presentation of its case.

The Trial may be said to have gone wrong for the government during its seven and a half months course chiefly by reason of two facts, namely the unreasonable length and the sustained farcicality of the whole proceeding. The Trial went wrong because the government did not expect the Trial either to prove a farce or to last so long. That the government did not expect the Trial to prove a farce need hardly be argued. That it did not expect the Trial to last so long can easily be proved by numerous statements made prior to the beginning of the Trial by both the judge and the prosecutor. While the trial judge, Chief Justice E. C. Eicher of the District Court of the District of Columbia, was drafting local lawyers to serve without pay as defense counsel for each of the thirty odd defendants, only three or four of whom were able to afford counsel of their own choosing, he told several of these attorneys that he did not expect the case to last more than two or three months. The prosecutor, Oetje J. Rogge, also made similar statements to a number of persons prior to the Trial, including many defense counsel and members of the press. There can be no doubt that these statements by both judge and prosecutor were made in the utmost good faith. The facts that they were made and that they were so far in error constitute conclusive proof that neither the trial judge nor the prosecutor really understood the nature of the government's indictment, the quantity and types of evidence necessary to sustain such charge, or the procedural difficulties inherent in any undertaking to send thirty persons to the penitentiary for ten years by proving to a jury of twelve men and women a vast, complex historical thesis which the defense and the authors of this book held to be not susceptible of proof within the framework of the rules of evidence.

The fact that the government expected the Trial not to run over two or three months when the government had a case which was nothing more or less than a vast historical thesis, requiring for its support the submission in evidence to the jury of thousands and thousands of exhibits or pieces of writing and the testimony of two hundred witnesses—a case that would have taken a year or more to present against even the most perfunctory defense opposition— is a substantial reason for saying that, regardless of the final outcome, the Trial went wrong for the government. The Trial, after several months of weary procedure and several weeks before the untimely death of the judge, had proved conclusively that the government was experimenting with something neither the judge nor the prosecutor understood. Their miscalculation as to the time factor alone suffices to prove this.

The only course which might have saved the government's face and possibly secured some measure of success for the prosecution in the Sedition Trial would have been for the government to get all the defense lawyers first to admit the existence of the precise world movement to destroy democracy and to Nazify the world, including the United States, by causing insubordination in the armed forces as alleged in the indictment; second, to admit the existence of the conspiracy laid in the indictment except that the defendants on trial did not participate therein. Then the Trial might have ended in a couple months, since the prosecutor would not have needed to submit his four to eight thousand exhibits and put on the stand his hundred odd witnesses to prove the existence of his alleged world conspiracy. All that the prosecution would have had to do would have been to show some participation by the defendants in the conspiracy charged after which the defendants would have put in their defense denying such guilty participation.

Prosecutor Rogge probably expected some such course of defense strategy once the defense lawyers saw how much material the government had to offer and how long its introduction in evidence would take. All but four of the defense lawyers were court appointed and unpaid. It was to their interest to get the Trial over with as soon as possible. It was also the obvious self-interest of the four paid attorneys, who were not being paid on a per diem basis, to end the trial as quickly as possible.

Rogge had to reckon that in a trial of this nature it is usual for most defense lawyers, suddenly brought into the case with no knowledge whatever of its background, to prefer fighting on the law to fighting on the evidence. Fighting on the law is easier for a lawyer and takes less work, time and money than fighting on the evidence. That is one of the great advantages of the government in presenting a case which consists mainly of history, theory and political interpretation. The government has had over a year to prepare its case. It has worked with unlimited funds. It has had unlimited personnel to do research, to gather, organize, card index and interpret evidence, and to conceive and write up the prosecution's historical and interpretative thesis. The defense lawyers, on the other hand, lack almost everything requisite for dealing with the evidence in such a prosecution. Defense lawyers in a political trial of this kind are normally incapable of putting up a fight on the evidence largely because they are unfamiliar with it and because they have not the time and necessary means to prepare themselves or engage others to put up a fight on the evidence. Consequently, they usually try in such cases to fight the prosecution on the law and make a record for appeal. One defense lawyer, William J. Powers, whose client was serving a long sentence on a wartime conviction for violation of the sedition section of the 1917 wartime Espionage Act used to say repeatedly during the Trial, both in open court and in private talks with colleagues in the case, "I am going to beat this case on the law." The authors recall no cases of this character, either in the last war or "in this war," being won by the defendants on appeal on points of law.

As for fighting the prosecution on the law in a political mass trial conducted in wartime, the chances for a defense victory, either in the court of first instance or on appeal, are exceedingly slim. During the present war the Supreme Court up to the date of writing this book had reversed convictions or judgments in five major civil liberties cases, two involving alleged communists and three involving alleged Fascists, in each of the five different cases entirely on the insufficiency of the evidence and in no case on a point of law. The authors know of no free speech case in this war in which there was a reversal by the Supreme Court on a point of law. They know of many appeals in civil liberties cases during this war on points of law which were either lost in the Appellate courts or denied review by the Supreme Court.

It has to be recognized that in wartime the natural tendency of the courts, from the Supreme Court down, is to sustain rather than disagree with the government on any disputed point of law in a political trial in which the government has wrapped itself in the flag and made its prosecution appear to be a matter of national defense in an hour of grave emergency. But, in the field of evidence, judges of the highest court naturally find it more difficult to sustain the government, even out of patriotism, against the facts or in support of a judgment clearly unsupported by any real evidence. The moral is that any victim of a wartime witch hunt or political prosecution should always have his defense prepared with an eye single to the evidence rather than the law.

It will usually be found, on careful analysis of a civil liberties case in wartime, that the abuse or error on the part of the government is due to a misconstruction of the facts rather than of the law. It is easy to twist either the facts or the law, but it is easier to force recognition of a twisting of the facts than of a twisting of the law. Moreover, it is harder to sustain two opposite theories as to what are the facts than as to what is the law. In this connection, it is to be recalled that Chief Justice of the Supreme Court Charles Evans Hughes once said: "The Constitution is what the Court says it is." And a judge is more apt to agree with the government than an alleged seditionist as to what is the law in time of war. But no Supreme Court justice or other reputable judge is known ever to have said: "The facts are what the judge says they are." Facts, as prosecutor Rogge in the Sedition Trial and many others before him have learned, are stubborn things.

Briefly, the Sedition Trial turned quickly into an impossible farce mainly because prosecutor Rogge ran into a fight on his evidence not expected by him or the Department of Justice. There are those who blame the defense lawyers for this fight. Obviously, the infirmity of the evidence rather than the perversity of the lawyers was to blame.

Probably Rogge hoped for a speedy trial because it has been the experience in conspiracy trials of a great number of defendants that rather than stand a long, costly trial, the majority of the defendants plead guilty or nolo contendere and that defense attorneys hardly ever attack a conspiracy charge head-on.

In connection with the time element in the Sedition Trial it is pertinent to remark that a criminal prosecution in which the government needs a year to present its case is open to grave objection on this ground alone in conjunction with the right to a speedy trial guaranteed by the Sixth Amendment. A prosecution case that takes a year to present is also not properly triable under Anglo-Saxon trial by jury for the following, if for no other, reason: No jury can possibly remember and weigh evidence of such volume and complexity that it takes a year to be presented. In short, history is not evidence. Juries have no business weighing historical theses that take a year to unfold. A jury's opinion as to the merits of two opposing historical theses can have no possible validity in determining the guilt or innocence of any individual or group of individuals of committing a specified violation of a given law at a stated time and place. Indeed, a jury's opinion about a disputed point of history could not have the slightest value for the purpose of settling the dispute. History is something historians will disagree about until the end of time. Even Washington under one Administration cannot agree about Pearl Harbor. It is not something jury trials can ever settle. Historical debates are for historians, not court trials and juries.

In addition to the time factor as a part of the explanation why the Sedition Trial went wrong for the government, there is the fact of its persistent farcicality. In the fourteenth week of the trial Washington's leading morning newspaper, *The Washington Post*, on Friday July 28, ran an editorial headed by the caption "A COURT ROOM

FARCE.'' Subsequently, according to the New York newspaper *PM* of Wednesday, August 2, 1944, ''*The Post's* managing editor A. F. Jones, today told *PM* 'I'm not going to keep a man tied up on a lot of baloney.' He indicated that he would assign a man to cover the court house 'if there is any big news over there.' '' *The Washington Post* had for several years prior to the trial vehemently pressed for action by the Department of Justice against most of the defendants in the Trial. Its editorial strictures against the Trial, therefore, were in no sense inspired by sympathy with the defendants. Quite the contrary. These barbs of editorial ridicule directed at the Trial were expressive of the prevailing consensus in the nation's capital after the first eight or ten weeks of the Trial that something was wrong. (The two editorials from *The Washington Post* and the item from *PM* appear in full in Appendix 1.)

At the beginning of the Trial some fifteen or more press representatives were in attendance. After the third month, this number had dwindled to only two or three, a representative of *The Washington Star*, a representative of the United Press and, most of the time, a representative from the International News Service.

The Washington Post could walk out on Trial on the sound view that it was not worth covering. The Trial judge refused to take this view of the government's evidence. The jurors could not walk out. Nor could the court appointed lawyers.

A favorite line of one of the defense attorneys, John Jackson, in objecting to the admission of large batches of government evidence consisting largely of newspaper clippings and irrelevant memoranda notes and bits of correspondence expressive of political ideas and opinions mainly, was to characterize this material as ''trash.'' But such ''trash'' kept going into the record as ''provisionally'' admitted evidence month after month right up to the day of the judge's death.

What, in brief, was wrong from the very start? What made the Trial last so long and prove so farcical was the fact that the Trial and the government's historical thesis, rather than the defendants, went on trial and remained on trial till the end. The trial judge was put on the defensive and kept on the defensive along with the prosecutor for allowing such a Trial to proceed. There was only one issue throughout the Trial, namely, the Trial itself. The judge held that the government had a right to proceed with the Trial on the prosecution theory. The defense held the contrary. The Trial was largely a seven and a half months' wrangle between the judge and the prosecutor on one side and the battery of defense lawyers on the other over this central issue. The lawyers said, in effect, that it was an impossible case. The judge stood his ground till his heart gave out.

For the duration and farcicality of the Trial, the government and all who approved of the prosecution theory blamed the defendants and the defense attorneys. Attorney General Biddle, in statements to representatives of the press, is reported in the press to have characterized as "Nazi tactics" what the defense did during the Trial. Undoubtedly errors and breaches of decorum were committed during the Trial by certain defendants and defense attorneys. But they were also committed by the prosecution. For one such breach the prosecutor was reprimanded from the bench by the judge. It is inconceivable that a Trial of such length and complexity could have been free of errors and breaches of decorum at all times by all participating attorneys. But the length and farcicality of the Trial are not to be explained as consequences of the misconduct of defendants or defense attorneys in court.

If a criminal trial could be indefinitely prolonged and turned into a farce by a simple willingness on the part of the defendants and their lawyers to act perversely in court, scores of criminal trials would be thus disrupted where the defendants have plenty of money to spend on hiring unprincipled and unscrupulous lawyers to defeat the ends of justice. Actually no such obstruction of justice is practical in any normal criminal trial. Lawyers could not readily be found to attempt tactics calculated to turn a truly criminal trial into a farce. In a trial in which the prosecution had a real case, such tactics would not stand a chance of accomplishing more than a minor delay and they would prejudice the jury against the defendants.

Any unprincipled lawyers taking advantage of legal procedure to turn a criminal trial into a farce would incur disciplinary action, if not disbarment, at the hands of their professional colleagues. Court discipline and professional standards of conduct are upheld in the courts by the force of public opinion and professional opinion rather than the power of the judge to punish for contempt. It is utterly unthinkable that a score of unpaid and court selected defense lawyers, representing defendants whom they had never seen before and with whom they had no ties of kin, interest or political sympathies, should all conspire for over seven and a half months to prolong unduly and turn into a farce a trial which they had every reason and consideration of self-interest to terminate as quickly as possible. It is just contrary to reason and all laws of probability to suppose that a score of court picked lawyers could be found to act in this way as a matter of simple cussedness or irresponsibility. Any idea that these lawyers did turn the Sedition Trial into a farce by reason of their perverse use of legal tactics should be dispelled by the fact that when Justice Proctor, one of the senior judges of the Washington District Court, declared a mistrial and dismissed the jury, he expressly thanked and commended both the jury and the unpaid lawyers for their long and difficult tour of duty. He found nothing in the record to justify anything but words of thanks and praise for these attorneys.

The truth of the matter, of course, is that all, or nearly all, of the defense lawyers developed during the Trial strong feelings and convictions against the government's case. These were not sentiments of sympathy with the defendants, though the court appointed lawyers did come to feel nearly as sorry for the defendants as they felt for themselves on account of their mutual involvement in what seemed an absurd waste of time. What the defense counsel felt most strongly about the case was righteous indignation that the time of the court, the money of the people and the time and money of court appointed and unpaid defense attorneys were being wasted on what seemed to them an improper prosecution, which had little chance of yielding convictions. Several defense attorneys, notably Bateman Ennis, Harry Grant and Frank Myers, expostulated repeatedly to the court against this waste of time and the people's money.

For the first two or three months many defense counsel withheld judgment on the Trial and on the government's case on the natural assumption that eventually the government would produce some real evidence. After a certain length of time, varying with different counsel, each lawyer who expected the government eventually to produce some real evidence reached the conclusion that the government's entire case was just more and more of the same sort of selections from newspapers and publications and more and more of the same sort of testimony as to activities and utterances by the defendants to which testimony the natural reaction of any unprejudiced listener could be resumed in two words: "So what?"

The Trial was farcical because it at once became a trial of the Trial or a trial of the government's case rather than a trial of the defendants. For this the government's case was alone to blame. A case which puts itself instead of the accused on the defensive is, for that reason, if for no other, a farcical case. No amount or kind of cunning or perversity on the part of defense counsel can put a good prosecution case on the defensive and keep it on the defensive throughout most of seven months of trial. If the courts are to function properly in criminal procedure they must try only properly triable criminal charges, not historical or political theses.

In a normal criminal trial the big question from start to finish is Did the accused do it? This is the issue of fact. This question, Did the accused do it? often divides itself into two related questions. The one is: Did the accused do the act charged, such as slaying some one or breaking into a house by night? The other question is: Did the doing of this act constitute the crime of murder or burglary as charged? The first question is as to the occurrence of the act and the second is as to the intent behind it. The first question is exclusively for the jury. The second question poses for the jury an issue of opinion, interpretation or judgment as to the quality of an act—was the killing justifiable homicide in self-defense, unpremeditated manslaughter or premeditated murder? Now a jury is competent intelligently and validly to pass on the quality of one act, like the slaying of some one. But a jury cannot give a verdict worth two cents on a historical debate or on the quality of thousands of acts and millions of words expressing political and social ideas uttered by thousands of persons over a period of years. No individual's opinion, no jury's opinion as to the quality or meaning of such a vast pattern of words can have the slightest value for the purposes of criminal law. One might as well try to settle once and for all the question whether baptism is by sprinkling or immersion by submitting the question to a jury.

In a criminal trial the court instructs the jury as to the definition of each of the possible crimes or degrees of crime of which it may find the accused guilty. The terms used, in a given case, such as murder, manslaughter or justifiable homicide, are all terms which have a precise and invariable meaning in legal terminology and in common use. Every layman is supposed to be able to understand the meaning of these terms when they are explained to him.

The Sedition Trial was a farce because it never presented to the jury those simple and justiciable issues of fact which any proper criminal trial should pose. There was seldom any real question during the Trial whether a given defendant had said, written or done what the evidence tended to attribute to him. And even where the given defendant's cross examination seemed to indicate challenge of the truth of the evidence offered about himself, it would have proved nothing had it been true that he had said or done the things alleged to have been said or done by him. Nor was there any question whether the things the defendants were alleged to have said and done constituted the crime of advising, counseling, urging or causing insubordination in the armed forces with intent to impair their morale or conspiring to do this. The only possible issue of fact in the Trial were whether the evidence proved the existence of the alleged world conspiracy to cause the insubordination and whether it proved that the defendants joined this world conspiracy.

The government's prosecution theory said, in effect: "We postulate a world conspiracy, the members of which all conspired to Nazify the entire world by using the unlawful means of undermining the loyalty of the armed forces. We ask the jury to infer the existence of such a conspiracy from such evidence as we shall submit about the Nazis. We shall then ask the jury to infer that the defendants joined this conspiracy from the nature of the things they said and did. We do not need to show that the defendants ever did or said anything that directly constituted the crime of impairing the morale or loyalty of the armed forces. Our thesis is that Nazism was a world movement which by definition was also a conspiracy to undermine the loyalty of the armed forces and that the defendants were members of the Nazi world movement.''

To make out a case of this nature, the government asked leave of the court to weave over a period of months a gigantic and fantastic pattern of selected writings, utterances and political activities of the Nazis in Germany and the defendants in the Trial with a view to asking the jury to infer from this pattern that the Nazis had a world conspiracy to undermine the loyalty of our armed forces, and that the defendants had joined this conspiracy. That the Trial was a farce can only be attributed to the nature of the government's peculiar undertaking and to the obvious defense objections to such an undertaking. It was due to qualities inherent in the prosecution case or theory that the Trial remained a farce from start to finish. The Trial judge and the prosecutor repeatedly indicated displeasure with the defense lawyers that the latter did not try to help the government to make a success of its prosecution. Obviously, the function of a defense is not to help the government with its case, or if that case has fatal weaknesses to help the government to prevent such weaknesses from turning the trial into a farce.

The government's case simply was not susceptible of proof within the framework of trial by jury and the long established rules of evidence. The government's case would have made a subject for a college debate though, it must be recognized, the government's thesis that Nazism was a worldwide conspiracy to set up Nazism everywhere by use of the unlawful means of undermining the loyalty of the armed forces everywhere was a thesis that runs counter to the consensus of expert opinion about and accepted interpretation of the Nazi movement. But a criminal trial is not supposed to be an academic debate on the merits of a given historical thesis. Trying to stage a political and historical debate in a criminal court can only produce a farce.

Saying that the government's case was not susceptible of proof within the framework of the procedure known as trial by jury is by no means the same thing as saying that a violation of the law under which the indictment was drawn could not easily be proved, if it occurred.

If any number of persons ever formed or joined a conspiracy to

> (i) advise, counsel, urge and cause insubordination, disloyalty, mutiny and refusal of duty by members of the military and naval forces of the United States; and (ii) distribute and cause to be distributed written and printed matter, advising, counseling, and urging insubordination, disloyalty, mutiny and refusal of duty by members of the military and naval forces of the United States, with intent to interfere with, impair and influence the loyalty, morale and discipline of the military and naval forces of the United States,

it should be a comparatively simple matter to prove the formation, joining and furthering of such a conspiracy, which, in the language of the statute is very precisely defined. The trouble with the government's case, brought under this very specific statute, was that the government had no evidence whatsoever indicating that any defendant had ever had the intent, or did anything, to commit the offense stated. In fact, with possibly one exception, the evidence introduced had not the remotest connection with appeal to the armed forces. And in that one instance in which the evidence might be considered to link the literature of one of the defendants with the armed forces, there was absolutely nothing in such literature to suggest an attempt or intent to cause insubordination in the armed forces. One of the repetitious statements of defense counsel which helped to make a farce of the Trial was a question: "What has that to do with impairing the morale of the armed forces?" or, quite simply "What has that to do with the armed forces?" The answer of the prosecution, in effect, was: "This piece of evidence is essential to the making out of the government's case. When our evidence is all in, we shall show why and how it comes under the statute."

The government, in other words, proposed to prove its case mainly by argument at the close of its evidence rather than let the evidence prove the case. It is the theory of trial by jury that the jury must draw its own conclusions from the evidence and not function merely as an instrument for ratifying the inferences of the prosecution. The function of the closing arguments to the jury, both of the prosecutor and of defense counsel, is merely to discuss the admitted evidence in order to aid the jury in arriving at a true and just verdict.

A necessary condition for the operation of trial by jury, according to Anglo-Saxon rules, is that evidence be not presented which is irrelevant or immaterial, or which can only serve to confuse the issue or prejudice the jury against one side or the other without proving anything germane to the issue. Thus, it would not be permissible or fair in trial by jury to present in evidence against a man charged with murder or any other heinous crime all the reprehensible or foolish things he had ever said or done that the prosecutor cared to select and submit for the jury's consideration. The accused might, by general agreement, be pronounced a bad egg or a most disreputable character, yet be entirely innocent of the crime charged. Marshalling against defendants in a political conspiracy trial all the foolish things they had ever said or done of a political nature, as the government tried to do in the Sedition Trial, could not possibly, under Anglo-Saxon rules of evidence, be relevant to the charge that they had conspired to undermine the loyalty of the armed forces of the United States.

At the conclusion of the first chapter, which is a sort of opening statement of what this book attempts to explain about the Sedition Trial, let it be stated with all the emphasis possible that the analysis here undertaken does not seek to prove anything whatsoever, good or bad, favorable or unfavorable, about any one or all the defendants. This book has not been written to clear the defendants in the Sedition Trial. It has been written to indict the prosecution. No attempt will be made even to explain or interpret the several defendants in the Trial. One obvious reason for not including such an attempt in this book is that the defendants in the Sedition Trial are too utterly different in almost every way, one from the other, to be described or characterized by any one or more sweeping generalizations. This book is about the Trial, not the defendants. The Trial was important. The defendants were not. The Trial is a matter of record. The personalities and activities of the defendants could not be objectively discussed on the basis of available evidence comparable to that which is available about the Trial in the form of the court record.

In brief, the answer of this book to the questions: Why did the Trial go wrong for the government's purposes? Why did the Trial last so long? and Why was the Trial such a farce? may be preliminarily subsumed in the statement that the government's case was not susceptible of proof within the framework of trial by jury. If this be true, then there can never be any question as to whether any of the defendants were guilty or innocent of the charges of the indictment. They must be presumed innocent because, (1) they were never found guilty and, (2) on the government's prosecution theory, they could never have been proved guilty. Had there been convictions, the Supreme Court would undoubtedly have reversed them for the same reason it reversed within a period of two years judgments in the civil liberties cases of Schneiderman, Hartzel, Baumgartner, the Bundists and Bridges for insufficiency of the evidence.

Some or all of the defendants may have been guilty of other crimes and misdemeanors. It is not our business here to say all the defendants were innocent of any wrongdoing or to speculate as to who was guilty of what. Some or all may even have been guilty of conspiring to undermine the loyalty of the armed forces, but not as charged by the government's indictment, the bill of particulars, the prosecutor's opening statement and the prosecution's statements throughout the Trial. Nothing in the evidence brought out during the Trial proved or even suggested that any one of the defendants was ever guilty of any such conspiracy, except on the prosecution theory. And on that theory, opponents of President Roosevelt's pre-Pearl Harbor foreign policy and steps in foreign affairs, such as Colonel Lindbergh, Senator Taft, Senator Nye or Senator Wheeler, and Colonel McCormick, publisher of *The Chicago Tribune,* would be equally guilty. Indeed, the prosecution case, according to the prosecution theory, would have been much stronger against these prominent isolationists than it ever could be against the less important defendants in the Sedition Trial.

So, from the point of view of this book, the Sedition Trial is on trial before the bar of history and not the defendants. As an experiment in the use of criminal law and criminal procedure as an instrument of political policy and as a tool of political propaganda, the Sedition Trial is on trial before the bar of public opinion and before the bar of professional legal opinion. This book presents, in the name of the public interest, a case against the Trial. It does not purport to make out a case for any one or all of the defendants. If the government has a proper case against any one or all of them, let it draw a proper indictment and make out that case under our rules of trial by jury and rules of evidence.

The Sedition Trial was a farce because the government did not have an indictment susceptible of proof or a proper case in support of its indictment. The evidence did not fit the law. The law did not fit the evidence. The prosecution case fitted neither the law nor the evidence. It was an ingenious theory which sought to get around the obvious misfit between the law, the charge and the supporting evidence. What the defendants could be shown to have said, written and done was not against any existing law. To get around this difficulty, the government had to invent an ingenious theory which was a vast historical thesis alleging a fantastic and unprovable world conspiracy of ideas and political tendencies. On that theory, the evidence fitted the law and the charge. But that theory could never be proved. Hence the Trial was a farce. Explaining and proving these broad generalizations about this historical Trial will be the task of the ensuing pages.

CHAPTER II.

PURPOSES BEHIND THE TRIAL.

To understand why the Sedition Trial did not come off according to plan, it is first of all necessary to understand the purposes behind it. A political trial is always unintelligible to any one who does not grasp the politics behind it or who assumes that it has the normal purposes of a criminal trial. The average citizen simply cannot believe that the government would put on such a trial unless there was what the lawyers call ''probable cause.'' He assumes that a criminal charge, on the preparation of which the Federal Bureau of Investigation and the Department of Justice worked for over a year, must have some basis in evidence of substantial violations of the law by some of the defendants. He is, therefore, inclined to take the traditional view of the old-fashioned juryman who, speaking of his several tours of jury duty, said: ''I takes a look at 'em, and I says to myself, if they wasn't guilty, what would they be doing there?'' Ordinarily, but not in a political case, it is a sound working hypothesis that people are not haled into court on an elaborate criminal charge unless somebody did something in violation of the law as charged.

The normal purpose of a criminal trial is to determine the guilt or innocence of the accused and to mete out justice. But the Sedition Trial was not a normal trial. It was a political trial. A political trial is held to serve political purposes. What the accused did, if anything, in violation of the law is purely incidental. The explanation why the government should undertake in a trial of unreasonable length and incredible farcicality to prove a case which was not susceptible of proof in trial by jury requires a clear statement of the political purposes of the trial.

The political purposes behind the Sedition Trial may be summarized in a few words: the Trial was conceived and staged as a political instrument of propaganda and intimidation against certain ideas and tendencies which are popularly spoken of as isolationism, anti-communism and anti-Semitism. Proofs of the foregoing statements may be found in the things said about the Trial by the people who wanted it, some samples of which are given in the next chapter. The best proof of it, however, is to be found in the prosecutor's opening statement given in full with our comments in this book.

As a propaganda project—it might be called a stunt—the Trial was planned to exploit a well-known technique of psychology or manipulation of public opinion that professional psychologists and propagandists often call by the name of "identification." To make people like something, you identify it in their minds with something they already like; to make them dislike something, you link it with something they violently dislike. If the job of identification between *a* and *b* is well done, the guinea pig on whom the job is done will transfer some of his dislike of *a* to *b* or vice-versa. The psychological principle of identification explains why professional politicians are always getting their pictures taken kissing babies or surrounded by their own families. The vice of this method is that usually the two things linked together, or identified the one with the other, in the presentation to the public mind, have no logical connection, one with the other. Thus, the fact that a politician is a good husband or a good father does not in any way prove that he will make a good congressman or a good state governor. There are plenty of good fathers and good husbands who are not fitted to be congressmen. Nor, for that matter, does the fact that a man's wife and children look sweet alongside of him in a photograph, or that they are willing to be photographed with him, in any way prove either that he is a good husband and a good father or that he will make a good congressman.

One of the dirty tricks used by the people behind the Trial in the publicity campaign to get certain defendants brought into it, including one author of this book, was that of publishing a perfectly innocent photo showing a defendant standing alongside a Nazi in uniform at the Nuremberg Party Congress, a yearly function attended regularly by hundreds of Americans, particularly newspapermen, writers, lecturers and college teachers, none of whom were in any way pro-Nazi. A photograph can favorably or unfavorably identify for the purposes of psychological reaction, without establishing thereby any logical ground whatsoever for a favorable or an unfavorable inference. A photograph of a man with his wife and children only shows that he has a wife and children and what they look like. A photograph of a defendant in the Sedition Trial at the Nuremberg Nazi Congress in uniformed Nazi company only shows that he, like thousands of other Americans, attended one such Congress and what a Nazi in uniform looks like. But, in either case, the photo in the minds of the unthinking can be made by a clever propagandist to suggest a great deal the photo does not prove and a great deal that may not be true. That is *identification.*

The biggest single idea of the Trial was that of linking Nazism with isolationism, anti-Semitism, and anti-communism. The fallacy of the identification in each instance is obvious to the informed and thinking person. American isolationism was born with George Washington's Farewell Address, not with anything the Nazis ever penned. As for anti-Semitism, it has flourished since the dawn of Jewish history. It is as old and widespread as the Jews. The only large areas where anti-Semitism does not exist are areas in which Jews are not found. The August 1945 issue of the magazine *Common Sense* carried an article by a Jewish writer on anti-Semitism in the Soviet Union. It was his complaint that although the Soviet regime was officially on record as being committed to the suppression of anti-Semitism, it had not succeeded in eliminating anti-Semitism in Soviet territory. The Old Testament is largely the story of a fight running over centuries between the Jewish people and their anti-Semitic neighbors. As for anti-communism, while it was one of Hitler's two or three biggest ideas, it is in no way peculiar to Hitler or the Nazis, any more than anti-capitalism is peculiar to the Russian communists. Anti-capitalism has been common to socialists all over the world for nearly a century, or long before Russia went communist.

The purpose of the government's case was to dramatize and publicize three false propositions which were essentially non-sequiturs. They took the form of syllogisms. Here they are. The Nazis wanted to keep America out of the war; the defendants wanted to keep America out of the war; therefore the defendants were Nazis or members of a Nazi world movement. The Nazis were anti-

Semitic; the defendants were anti-Semitic; therefore the defendants were Nazis or members of a Nazi world movement. The Nazis were anti-communist; the defendants were anti-communist; therefore the defendants were Nazis or members of a Nazi world movement. The propositions, of course, are logically on all fours with the statement: The Nazis are Anglo-Saxons; the defendants are Anglo-Saxons; therefore the defendants are Nazis.

Having just introduced the terms isolationism, anti-communism and anti-Semitism into our discussion, we hasten to qualify our use of these terms with a few explanations demanded by fairness to the defendants and the record. Probably few of the defendants would acknowledge without qualification the charge of isolationism or anti-Semitism. Many would justly deny it in toto. Some defendants like Lawrence Dennis, a native American, or George Sylvester Viereck, a naturalized German-American, could prove by their writings that they had never been anti-Semites. Most defendants probably would contend that their statements about the Jews did not warrant their classification as anti-Semites. This book does not attempt to classify the defendants or to qualify them with reference to terms like anti-Semitism, isolationism or anti-communism. The authors consider any such attempt, either on their part or on the part of the government, would be somewhat presumptuous as well as wholly irrelevant to the charge of conspiring to cause insubordination in the armed forces, the factual issue of the Trial.

The use of terms such as the three isms above named is not unlike the use of the terms heretic or infidel in the days of religious persecution. Thousands of persons who were put to death as heretics held that they were better Christians than those who had them put to death. Raising the question whether a given person is a good American or a Fascist, Nazi, anti-Semite or isolationist, is exactly like raising the question in the 16th or 17th century whether a given person was a good Christian or a heretic, an infidel, a witch or possessed of devils. It opens up a debate which has no place in a court of law or in any useful public discussion.

Because the prosecutor insisted on carrying out the purpose of the people behind the Trial by sustaining the affirmative of a non-justiciable issue, the Trial had to prove a farce. Supporters of the prosecution thesis seem to think that the Trial would not have been a farce if the defense had not sustained the negative. The logic of that view was that the defendants should have pleaded guilty to a charge, any rational debate about which could only result in making a farce of the Trial.

This book undertakes no definition of terms like isolationism, anti-Semitism, Fascism, National Socialism or Nazism. We use these terms only as the name-callers use them and as the prosecution used them or similar terms in the Trial. If the prosecution had charged the defendants with being members of the Nazi party or some other party, it would have posed a proper and justiciable issue of fact, whether or not they were Nazi party members, though not relevant to the commission of the crime of conspiring to cause insubordination in the armed forces, unless it could also be proved that this crime was among the purposes of such party. But, having no evidence that all the defendants, or that any, for that matter, belonged to the Nazi party, the prosecution tried to show they belonged to a Nazi world movement, which was another step removed from reality and reason.

In the view of the authors of this book, epithets like Fascist, Nazi and their corresponding isms can have no valid or legally acceptable definition except in so far as they may describe a specific party, organization or group which calls itself and its doctrine and program by one of these terms. Then, to prove that one of these epithets fits a given person, the sort of proof needed is a membership card or some record or direct evidence of membership. Terms like Fascism and Nazism are not like terms such as murder, manslaughter or larceny which have a precise and unvarying legal and dictionary meaning, and one generally understood by the average man.

To ask a jury to decide whether a given person is a Fascist or a Nazi who denies being one and who cannot be shown to belong to any party or organized group bearing that name is as silly as it would be to ask a jury to decide whether a given person is an atheist or an agnostic who denies being one and belongs to no party or organized group bearing that name. There is no place in an American law court or even in political debate for such arguments.

The prosecution specifically charged the defendants with preaching National Socialism, race prejudice, anti-Semitism and anti-communism. The evidence offered purported to prove that these doctrines were Nazi and therefore in violation of the law under which the charge was brought. This was serving the purpose of the people behind the Trial but not a rational purpose in a criminal trial. This was not a proper method of proof of the criminal charge as we shall have ample occasion to bring out throughout the book.

This book will not attempt to explain or say just what the several defendants believed or taught. It is about the Trial, not the teachings or activities of the defendants. The prosecution made no attempt to give the jury a complete or fair picture of what each defendant believed or taught. It rather presented carefully selected extracts from utterances and writings of different defendants intended and sometimes calculated to support the contention that the defendants were co-partners in the same world movement of ideas. But there was no evidence to show that one feature of their world movement of ideas was conspiracy to cause insubordination in the armed forces. Our concern is not really to prove the falsity of this prosecution thesis but merely to show that it was not susceptible of proof.

It might be permissible in certain contexts to say that anti-Semitism or anti-communism are world-wide ideas or world movements in or of ideas. It might be true that many ideas held by the Nazis were also held by the defendants. But it would not follow from the truth of these generalizations that the defendants were either Nazis or in a Nazi world-wide conspiracy to cause insubordination in the armed forces. What the people behind the Trial wanted to have judicially certified to the world was that anti-Semitism is a Nazi idea and that any one holding this idea is a Nazi who is thereby violating the law—in this instance, by causing insubordination in the armed forces—through his belief in or advocacy of this idea.

All sorts of ideas are now world-wide and held by all kinds of people, but they cannot properly be used to link these people in any sort of criminal conspiracy or even in a legitimate confederation or agreement to pursue jointly certain common ends or to use certain means. Economic planning, social equality, higher living standards for the masses and racial equality, just like anti-Semitism, or racism, or isolationism, may all quite properly be termed world-wide ideas or even world movements. But the advocacy by different people all over the world of one of these ideas or tendencies in no way links them in any conspiracy or confederation. A group of Americans who might hold similar ideas and be pursuing social objectives similar to those of the British Labour party or the Soviet government may not for this reason be said to be in conspiracy or agreement with either. They, as a matter of fact, may be in conflict with each other on many matters.

From the point of view of the prosecutor and those behind the prosecution, the Trial was an adventure in public education. From the point of view of the defendants, it was an experiment in political propaganda. As a cynic once said, "The difference between education and propaganda is that if it is what I believe, it is education and if it is not what I believe, it is propaganda." The original or dictionary meaning of the word propaganda, of course, has no such connotation. The word propaganda in this connection was first used by the Catholic Church when in 1633 Pope Urban VII founded a college of propaganda for the education of priests for foreign missions. But whether one calls it education or propaganda, it is, or should be, perfectly obvious to any fair minded person that neither education nor propaganda is the proper function of a criminal prosecution. Education is for the schools, the churches, the press and other agencies of public enlightenment. So is propaganda, however defined. To conceive and stage a mass criminal trial as an adventure in either education or propaganda is absurd, to put it mildly. The result can only be a farce if the defendants are allowed to exercise their constitutional rights. If they are denied their constitutional rights, it is still a farce—of another sort. A Moscow or Berlin political trial, though it never ended in a mistrial or an acquittal, was just as much of a farce from the point of view of Anglo-Saxon justice as the Sedition Trial, though of a somewhat different and more bitter character. Political trials as propaganda instrumentalities may be farces a la Biddle and Rogge or farces a la Vishinsky. But, in either case, they are farces.

Intimidation of potential opponents, as well as propaganda for the masses, was an obvious purpose of the Sedition Trial. Proofs of this statement will be given throughout the ensuing pages. In connection with the Trial there has been so much use of the term "crackpot," even by such harsh critics of the prosecution as *The Chicago Tribune,* in characterizing the defendants, that it is likely to escape most people just how and why such a trial operates as a powerful instrument of political intimidation. People naturally take the view that whatever the government may do to "crackpots" cannot intimidate persons who, like themselves, are not "crackpots"—no one, of course, ever thinks of himself as a crackpot. However, what the government does today to a crackpot, so-called, it may do to an elder statesman of the opposition the day after tomorrow.

Crackpot is defined by Webster's Dictionary as slang for a harmless lunatic. As applied to the defendants the term crackpot is often used to mean agitator. Now if the defendants were either lunatics or harmless, there was no sense to trying them for conspiracy to cause insubordination in the armed forces. At the very beginning of the Trial, Lawrence Dennis moved the Court to have all the defendants, including himself, given a sanity test. When that motion was denied by the Court, with considerable asperity and embarrassment, Dennis moved the Court in writing to have three defendants whom he named, with grounds for the motion, examined for sanity. Dennis argued that he had an interest in his co-defendants' sanity since it would be highly prejudicial to him to be tried along with defendants who might be insane. No motion made in the entire Trial more visibly annoyed the judge than this one which was promptly denied. The last thing the government wanted was to have the sanity of all the defendants gone into. The government was trying to prove the defendants dangerous. It could not stand to have any of them shown to be harmless lunatics, that is "crackpots." As the judge would not allow the sanity of the defendants to be tested and as the authors make no pretense at being psychiatrists, they venture no conjecture of their own on this subject.

As for the defendants being agitators, the evidence unquestionably showed most of them to be of that type. Webster's International Dictionary says that an agitator is one who stirs up political, economic, religious or other social agitation. From the evidence, all the defendants might properly be held to fall into this category. An agitator is any one who is a zealous and fearless advocate of some particular cause, especially if it is a new or unpopular cause as was American Independence a few years before the Revolutionary War, or the Reform of the Rotten Boroughs and the extension of the suffrage in England in the middle of the 19th Century, or the abolition of slavery about the same time, or votes for women about the turn of the present century.

Professor Harold D. Lasswell, a government expert on propaganda whose testimony as to propaganda analysis was used to convict one of the defendants on an earlier charge similar in principle to the one on which he was again tried in the Sedition Trial, classified political roles under three headings: administrator, agitator and theorist in his book *Psychopathology and Politics*. Lasswell lists Herbert Hoover as only an administrator, the Old Testament prophets, Richard Cobden and Nicolai Lenin as agitators and Karl Marx as a theorist. He lists Lenin also as an administrator and theorist. Crackpot, as applied to the defendants, and agitator mean about the same thing, except, perhaps, that crackpot suggests emphasis on the idea that the person in question is, also, a bit cracked or of unsound mind.

Having in mind these general notions as to the meaning of the terms crackpot and agitator, one may say that all great movements, political and religious, have, in their infancy, been launched and promoted mainly by crackpots and agitators, or by persons who were so regarded by the majority of their contemporaries. The apostles and the early Christians certainly were so looked upon by the authorities who persecuted and tried to suppress them. Tom Paine and many of the agitators who helped start the American Revolution were so regarded. John Brown and the most active of the Abolitionists were certainly considered crackpots and agitators by their contemporaries. During the first two decades of this century, the crusaders for women's suffrage, like Sylvia Pankhurst, who repeatedly had herself chained to the iron fencing around the British House of Parliament, were considered crackpots.

The point here being stressed is ably stated by Professor

Chafee in his *Free Speech in the United States*, 1941 edition, when he says on page 561:

> The effect of suppression extends far beyond the agitators actually put in jail, far beyond the pamphlets physically destroyed. A favorite argument against free speech is that the men who are thus conspicuously silenced had little to say that was worth hearing. Concede for the moment that the public would suffer no serious loss if every communist leaflet were burned or if some prominent pacifist were imprisoned, as perhaps he might be under the loose language of the unprecedented federal sedition law passed last year for discouraging drafted men by talk about plowing every fourth boy under. [This is the law under which the 1944 Sedition Trial prosecution was brought.] Even so, my contention is that the pertinacious orators and writers who get hauled up are merely extremist spokesmen for a mass of more thoughtful and more retiring men and women, who share in varying degrees the same critical attitude toward prevailing policies and institutions. When you put the hotheads in jail, these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the nation. Once the prosecutions begin, then the hush-hush begins too. Discussion becomes one-sided and artificial. Questions that need to be threshed out do not get threshed out.

The crackpots, so-called, or the agitators, are never intimidated by sedition trials. The blood of the martyrs is the seed of the Church. The people who are intimidated by sedition trials are the people who have not enough courage or enough indiscretion ever to say or do anything that would get them involved in a sedition trial. And it is mainly for the purpose of intimidating these more prudent citizens that sedition trials are held. The cautious, of course, would be the last persons in the world to see this. It will never be known how much books like *Under Cover* and persecutions like the Sedition Trial contributed to Roosevelt's United Nations Charter not meeting in the Senate the fate that Woodrow Wilson's League of Nations met. The job was so well done that only three senators, Hiram Johnson, William Langer and Henrik Shipstead voted or paired against it and there was not enough criticism to make the formality of ratifying the Charter appear natural.

A government seeking to suppress certain dangerous ideas and tendencies and certain types of feared opposition will not, if its leaders are smart, indict men like Colonel Lindbergh or Senators Wheeler, Taft and Nye, who did far more along the line of helping the Nazis by opposing Roosevelt's foreign policy as charged against the defendants than any of the defendants. The chances of conviction would be nil and the cry of persecution would resound throughout the land. It is the weak, obscure and indiscreet who are singled out by an astute politician for a legalized witch hunt.

The political purpose of intimidating the more cautious and respectable is best served in this country by picking for a trick indictment and a propaganda mass trial the most vulnerable rather than the most dangerous critics; the poorest rather than the richest; the least popular rather than the most popular; the least rather than the most important and influential. This is the smart way to get at the more influential and the more dangerous. The latter see what is done to the less influential and less important and they govern themselves accordingly. The chances of convicting the weaker are better than of convicting the stronger. More important still, the issues are better confused in a mass indictment of so-called crackpots and unimportant agitators than in a mass trial of highly respectable and extremely cautious leaders holding similar views and having like tendencies. A few defendants who will be vulnerable are thrown in to discredit on grounds wholly unrelated to the offense charged.

In Soviet Russia, of course, the clique in supreme command can railroad any one, as was done to Trotzky, one of the founding fathers of the Russian regime. In America, the government has to proceed differently, more cautiously and less honestly, as we are not as far advanced as Russia along the road to serfdom, but we are moving fast in that direction. In America the government has to proceed along this path with guile and duplicity. It cannot prosecute as honestly as the Soviet regime which can charge persons on trial with the offense of being against the government. Here that cannot be charged. Therefore, the Department of Justice must be duplicitous and dishonest in the formulation of charges and the framing of a case. Washington wanted to try people for having talked against our entering the war, against the Jews and against the communists. There was no law against this sort of talk. So Washington had to try them for conspiring to cause insubordination in the armed forces.

While we are on the subject of the bad faith implicit in the Sedition Trial prosecution it will not be amiss to dispose of the frequently made and widely accepted explanation that it was a necessary measure of public safety taken in war time against certain individuals whose activities and propaganda were highly dangerous. One minute the press and news commentators would call the defendants "crackpots," the dictionary definition of which is a "harmless lunatic," and the next minute they would call them "dangerous." They could not be both. If these defendants had been dangerous, as the Washington propaganda about the Trial made them appear, or as the importance given to the Trial at its opening implied, why were most of them allowed to remain at liberty during two years of the war while the Department of Justice experimented with three indictments before as many Washington grand juries and in the Washington courts? Above all, why, after the death of the judge on November 30, 1944, terminating the Trial on December 7, in a mistrial, did not the Department of Justice forthwith, or within a reasonable length of time, which could not have been more than a few weeks, move to start up a new trial? If the charges were well founded, if the prosecution theory had any validity, these defendants were far more dangerous to the national safety than any Nazi saboteurs or spies that might have been landed from a German submarine on these shores during the entire course of the war.

The activities of the Federal Bureau of Investigation in connection with the fabrication of the government's case and the incidental investigation of the defendants reveal clearly the outlines of the administration's purposes. These purposes, as already stated, being propaganda and intimidation, the F.B.I. contribution was in no sense connected with any concern over the public safety so far as these defendants were involved but rather with the spreading of the rumor that they had all been in league with or in the pay of the Nazis. This piece of propaganda the agents of the F.B.I. carried on for their principals by asking everybody who knew any one of the defendants whether he could give any information to support the charge that the defendants had received German money or been in relations with Nazi agents. It was a slick piece of character assassination such as only a national secret police like the F.B.I., the Gestapo or the Ogpu can do to perfection. How much evidence the F.B.I. got against the defendants appears in the record of the trial and its final disposition. How much the F.B.I. served the purposes of Walter Winchell and those behind the Trial can be left to the reader's imagination. The Trial or the case was kept in the Washington courts for nearly four years. That was serving the ends of propaganda and intimidation about as well as any one could ask, considering there never was any evidence to support a proper criminal charge.

The record of the case speaks for itself. It reveals that at no time was the Department of Justice or the F.B.I. worried over the menace to the public safety or the war effort created by these thirty-odd defendants. The Department of Justice and the F.B.I. had about this case only a Hollywood producer's worry over a forthcoming and rather doubtful new dramatic production: Would it click with the public? Would it get a good press? Would it reflect credit on the impresario, the script writer and, generally, all those responsible for putting on the show? And, last but not least, would it pay, in this instance, not cash at the box office but votes in November?

A complicating factor in connection with this Trial was the fact that the government had to run the Trial within the framework of trial by jury. It was a Moscow show which could not be run according to Moscow rules. That was a great handicap for Biddle and Rogge. Given the truth of all that was said against the defendants in the indictment, the bill of particulars, the prosecutor's opening statement and in his many other statements during the Trial, the defendants should have been handled as are political enemies in Moscow or as the British dealt with Sir Oswald Mosley, the British Fascist, who was detained for three years during the war under Paragraph 18 B of the Defense of the Realm Act. But Washington could not follow Moscow, Berlin or even London in dealing with political enemies in wartime. It could not railroad the defendants to jail on a simple criminal charge, for it had no evidence. It could not hold them in preventive custody, for, unlike the British, it had no Paragraph 18 B. And it could not try them for what it had against them, for this is neither Russia nor Germany and we have a Constitution. Hence, to serve the purposes and people behind the Trial, Washington had to put on a courtroom farce.

The British have a legal device for locking up people they consider dangerous during war time without the formality of a trial. Paragraph 18 B of the Defense of the Realm Act authorizes this procedure, at the discretion of the Home Secretary. Under our Constitution, whose drafters were isolationists who did not have in mind the political exigencies of a government committed to internationalism, holding people in preventive custody on the grounds of 18 B is not legal. The British, to their great credit, used the powers of 18 B quite sparingly during this war, only a few hundred persons having been preventively detained, including a member of Parliament. In our opinion, it is unquestionably more decent as well as more statesmanlike for a government in wartime to detain without trial persons whom it considers dangerous and against whom it has no evidence to sustain a proper criminal charge than it is for that government to try to convict such persons on a phony criminal charge for which there is either no legal or no factual basis.

The case of Sir Oswald Mosley, leader of the British Union of Fascists, is here in point. Just a month before Biddle's Department of Justice secured its indictment of the thirty alleged seditionists, the British Government released Mosley from a London jail where he had been detained in preventive custody for nearly three years—in rather comfortable confinement in a small suite of rooms with his wife and the privilege of bringing in special food which, being a wealthy man, he could well afford. Interestingly enough, the Department of Justice named Mosley as one of the co-conspirators in the world conspiracy with which it charged all the defendants.

On December 9, 1943 the British Home Secretary was interpellated on the floor of Parliament as to why the British Government had released Mosley and not prosecuted him. We reproduce textually the following extract from the British Parliamentary Debates on the case of one of Rogge's co-conspirators in the Nazi world movement to overthrow democracy by causing insubordination in the armed forces: (Hansard Volume 395—No. 9 Thursday, December 9, 1943.)

> 63. Mr. Mander asked the Home Secretary whether in view of the widespread desire for the trial of those British Fascist leaders who co-operated with Hitler and Mussolini before the war, he will consider the desirability of preferring charges against them where evidence is available?
>
> Mr. Morrison (The Home Secretary): The tactic employed by the leaders of the British Union, both before and after the outbreak of war, was to exploit the liberty which our law and which Parliament is anxious to maintain, even under the stress of war, and to take good care not to bring themselves within reach of the criminal law. It was precisely because of our experience of Fifth Column activities in the over-run countries in Europe in the Spring and Summer of 1940, and because this abuse of our cherished traditions of freedom and liberty without any overt breach of the law constituted a serious menace to the security of the State, that it was felt necessary to arm the executive with exceptional powers of preventive detention. Before exercising these exceptional powers in any particular case, the question of taking criminal proceedings is always considered, and it is the policy to prosecute wherever practicable. If the suggestion is that Parliament should have enacted, or should enact now, some new law under which Sir Oswald Mosley could be brought to trial and punished for his past behavior and activities, the effect would be to make a person liable to punishment for doing things which at the time when they were done were not forbidden by law, and, however widespread may be the desire for bringing the British Fascist leaders to trial, a provision on the lines suggested would be wholly out of keeping with our conceptions of equity and criminal justice and with sound liberal doctrine.
>
> Mr. Mander: Is the Home Secretary aware that there is a very widespread desire throughout the country that

> specific charges should be directed against Sir Oswald Mosley? Do I understand from him that there is no evidence on which such charges could be based?
>
> Mr. Morrison: So far as I know, the answer to the latter part of the Question is in the affirmative. If I may say so with regard to widespread feelings in the country, there is a duty resting on Members of Parliament as well as Ministers to deal with such feelings when they are not based on evidence.

The British Government knew how to deal with feelings not based on evidence, but not so the American Government in the Sedition Case. Either the statement of the British Home Secretary on the floor of Parliament on December 9, 1943 about Mosley was false or the statement of the Department of Justice in its Bill of Particulars issued in February, 1944 about Mosley was false. The British Home Secretary said he knew of no evidence that Mosley had violated any British law. If the statements of our Department of Justice about Mosley had been true, Mosley would have violated British law by conspiring to cause insubordination in the British armed forces. It is fair to assume that if there had been evidence of any such violation by Mosley, the British Home Secretary would have known of it. In other words, it is reasonable to assume that if the British Home Secretary knew of no such evidence against Mosley, neither did Biddle nor the Department of Justice. It follows that the charge of the Department of Justice that Mosley was a co-conspirator of Hitler to cause insubordination in the British armed forces was, like the rest of the government's case in this cause celebre, without support of evidence and based on assumption and unfounded assertion.

The British considered Mosley dangerous enough during three years of the war, or down to December 1943, to hold in preventive custody. But the British, no more than we Americans, have any law under which to indict and convict a man on the charge of being dangerous. To their eternal credit, the British have too much respect for law, fair play and their courts to try him for one thing and convict him of another. They would not besmirch the good name of their courts with a farce like the Sedition Trial of Washington. Their Home Secretary practically said as much on the floor of Parliament in reply to the same sort of people who got Washington to put on for them the Sedition Trial.

Sir Oswald Mosley was a far more important figure than any one of the defendants. He is a rich man, an aristocrat by birth, a former member of Parliament and the British Cabinet, a veteran of World War One with a distinguished record. Moreover, Mosley had before the beginning of this war a uniformed and disciplined organization which called itself the British Union of Fascists. He had publicly denounced the Jews and praised both Hitler and Mussolini. None of the defendants had a record as an avowed or self-styled Fascist even remotely comparable to that of Mosley. Most, if not all, of the defendants denied ever having been a Fascist or a Nazi. Certainly, the prosecutor neither showed nor promised to show any evidence against any of the defendants comparable to what is common knowledge about Mosley and his British Union of Fascists. The label of Nazi could only be applied with some excuse to the few defendants of German birth who had been active in the German-American Bund, which organization, however, denied it was Nazi in character or purpose.

The British would not try Mosley on a phony charge to please certain minorities. With plausibility they detained him under Paragraph 18 B of the Defense of the Realm Act without benefit of habeas corpus for the duration of the emergency in which they said he might prove dangerous. With dignity they released him from such custody a year and a half before the war was over and declined to attempt a legalized lynching on him to please certain British groups similar to those that got the Sedition Trial put on for their gratification. The American Department of Justice did not consider the defendants dangerous enough to ask more than $2500 bail. At the same time it undertook to convict them of participating in a conspiracy with the enemy to cause insubordination in the armed forces in time of war. It didn't make sense.

The fact of the matter was that the imprisoning of the defendants was not the real purpose of the Trial but only a necessary and incidental means of, or connected with, serving the purposes and people herein discussed. The only restraint or surveillance put on most of the defendants of a significant character has been aimed at preventing them from earning an honest living and contributing to the war effort by the exercise of their vocations, some of which, as in the cases of McWilliams and Deatherage, were in fields like industrial engineering and of great value in wartime. No, the purpose of the Trial was neither national defense nor internal security. It was merely propaganda and intimidation. The Trial proved a farce because the institution of trial by jury under our Constitution, rules of evidence and best legal traditions does not lend itself to the service of these political purposes.

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CHAPTER III.

PEOPLE BEHIND THE TRIAL.

In the preceding chapter we considered the purposes behind the staging of the Sedition Trial, namely, propaganda and intimidation against isolationism, anti-Semitism and anti-communism. In the theory of the people behind the Trial and the prosecution they brought about to further their ends, the three isms just named are subsumed under the all embracing ism of Fascism or Nazism. Fascism is a catch-all smear word to apply to all one's political opponents. In this chapter we take up the people behind the Trial. Without a clear understanding of the two major causative and directive factors, purposes and people behind the Trial, one finds the eighteen thousand page record unintelligible. Thus, the authors begin with the key to the puzzle rather than the puzzle.

The people behind the Trial can be lumped under one heading of the intolerant. They can be divided into three broad classifications of the leftists of various shades, certain Jewish and pro-Jewish groups and the internationalists. They could be further divided into hundreds or thousands of organizations and minority pressure groups of all sorts, the mere listing of which would seem unnecessary for the purposes of this book as well as impractical for any one without command of resources for investigation and collation of material not at the command of the authors.

The one broad classification which fits all the people actively behind the pushing by the government of the Sedition Trial is that of the intolerant. These are the people who believed that the United States was engaged in a religious or holy war, which the American people were fighting for one ideology against another. As for the validity of this view of the war, we refer the reader to the comments of Demaree Bess, cited on page 285.

The notion that this has been a war of ideologies was simply stated by a military commander, Lieutenant General John. C. H. Lee, U.S.A. commanding Headquarters

Communications Zone, European Theater of Operations, in a general order to the American forces in which he said: "But, as we have defeated Nazi might, so now we must defeat Nazi ideas."

The War Department, probably due to the pressure of the people behind the Trial, laid down what it called an "Orientation Program." In a letter from the Chief of Staff's office to Congressman Warren G. Magnuson, dated April 25, 1945, it was stated that *Army Talk* was a weekly publication of the Army for use by Information and Education officers who are responsible for conducting weekly discussions, and that the talk may or may not be used dependent on the desire of the local commanding officer or the Information Officer.

The weekly publication *In Fact* (one of the people behind the Trial) of August 27, 1945 stated, with loud expressions of regret, that according to its investigations, this line of War Department sponsored propaganda was 99% not used by the various commanding officers having discretion to use or not use it. It was this propaganda which undertook to define officially Fascism and other ideological terms and concepts for G.I. Joe. It taught the soldiers that "Fascism is a political, social and economic form of society accomplished by certain powerful financial interests and a military machine." It also taught that racial theories that there are differences between the Negro, the yellow and the white races are false. It sought to indoctrinate the men in the army with the idea that they were fighting a religious war and to catechize them in the political religion for which they were allegedly fighting. It is not surprising, and an ecouraging indication, that there is more sense among the army commanders than at headquarters to learn from *In Fact* that this propaganda was 99% not used by responsible army commanders in this country.

What is wrong with the notion that this is a religious war for one ideology against another ideology called "Fascism"? The answer must be left largely for subsequent discussion. Suffice it here to point out the simple fact that the American Congress only has authority to declare war and that it voted a declaration of war on certain countries, never against any specified ideology or set of ideas, and that there is no legal or even authoritative dictionary definition of the ideology of America or the ideology or ideologies against which some say we are fighting. It is easy for a general to say we are fighting some brand of ideas. If he were called upon to write an examination paper in a freshman course defining the ideas against which we are fighting, he probably could not get a C minus on his paper. Military training has never included advanced instruction in the history and content of political ideologies.

There can be no legal or moral basis under our theory of government for prosecuting Americans for their ideas or ideologies. The people behind the Trial, however, do not think so. The Trial was brought about by pressure groups which believe in using criminal law to combat ideas and ideologies they do not believe in and wish to have suppressed. It is our theory that political and other ideas should be combatted in the free market of ideas and neither with the soldier's rifle nor the policeman's club. The people behind the Trial do not hold with that theory. Theirs is the theory of Moscow, of Nazi Germany and of Fascist Italy.

At the outset, the authors wish to interpose with all the emphasis at their command the statement that all or even a majority of the people, especially of those who are not leaders, in the groups just listed, namely, the leftists, the Jewish groups and the internationalists, did not clamor for or even favor in principle the bringing of the Sedition Trial. It was only an articulate and aggressive minority of intolerant extremists in the ranks of leadership in these three major groups who plumped for prosecution by the Department of Justice of those whom they considered ideological heretics. In each of these three groups, with the exception of the sub-group of full fledged members of the Stalinist Communist party, it is probably true that a clear majority of followers believe in the general principles of free speech and civil liberties and would oppose in theory the bringing of a prosecution like this. But that tolerant and inarticulate majority lacked the nerve, understanding of the issues and initiative displayed by the intolerant extremist minority of leaders. What is more important, they did not know what they wanted as clearly as did the articulate and intolerant minority of leadership which followed the Moscow line.

No one, of course, wanted to be considered a defender of the defendants. It is not the habit of prudent Americans to rush out to stop a lynching. The American practise in respect to lynchings is to deplore them after they are over and ignore them while they are in progress. No one wanted to be smeared with the label or epithet of Fascist, Nazi, isolationist, anti-Semite, un-American or, even, red-baiter. Whenever the subject of action by the Department of Justice against so-called subversive persons came up, the question was never: Do you believe in fair play, justice, due process of law, civil liberties and freedom of speech, even for those with whom you violently disagree? No, the question always was something like this: Do you believe in Fascism, Nazism, anti-Semitism, isolationism? Or: where do you stand on these isms? If one was against them, as all respectable and prudent people wanted to have it understood they were, and if one accepted the popularly propagandized idea that this was a war of one ism against another, then one was expected to support all witch hunts against the ism or isms we were supposed to be fighting. Jailing people with the wrong isms at home was thought to be as much a part of the war as bombing women and children in the enemy countries.

It has been said that truth is the first casualty of war. In the simple division of all mankind into Fascists and anti-Fascists, there is, of course, a total confusion of issues and blackout of truth. Possibly most of the blame for this confusion may be laid initially at the door of Adolf Hitler and the Nazis. It was they who made a cult of a similar fallacy, that of dividing the world into two opposing camps, one of which was supposed to be dominated by a world conspiracy of Jews, communists and international bankers. Originally, of course, there was no such united front, but Hitler and his crusade more or less created it for the duration of the war against Hitler. Now that Hitler is gone, this temporary and accidental unity of capitalism with communism, of British and Russian imperialisms, of Jews and Christians outside of Germany, of American Republicans and Democrats, of racist southerners and equality-seeking Negroes, of Tammany politicians and communist leaders in New York and so forth, may be expected rapidly to dissolve. It came and went with Hitler.

But the normally impossible fusion of forces that Hitler brought about against his regime has made it easy for most Americans to believe the wildest tales about a corresponding world union of Fascists, composed of anti-Semites and nationalists everywhere. The fact is that both fronts are now largely unreal. And a further fact is that Hitler in his palmiest days never achieved the union of forces attributed to him or a coalition in any way comparable to that which he forged against himself. Thus, Japan was never as united with Germany as Soviet Russia has been with capitalist America and Britain for the duration.

It is just as absurd to say that whoever opposed American entry into war was linked with the Nazis, or whoever criticized the Jews or the communists was a Nazi, as it was for Hitler to say that the international bankers, the communists and the Jews of the world were similarly linked. This is the general idea of the Protocols of Zion. The Jews in Europe were the victims of this concept of a world conspiracy. The defendants in the Sedition Trial were the victims of the same theory in reverse. To understand this Trial, one must understand this concept and the people behind it. Purposes must have people behind them. Ideas are always linked with interests. To understand the idea, one must know the interest behind it.

I. *The Extremists on the Left.* The most extreme and unscrupulous exploiters of the fallacy of a Fascist international, or the Protocols of Zion in reverse, were and still are the communists under the direction of the Third International. It is their official, tried and proved tactic to call all their enemies and opponents Fascists. The day they fall out with the administration at Washington, they will denounce it as Fascist. That is their word for all their enemies. The weekly journal of opinion *The Tribune*, expressing the extreme left point of view of the British Socialist Labour Party, said in its issue of July 13, 1945, campaigning against Winston Churchill, "That is why, whenever you scratch a Tory, you find a Fascist." All that Churchill ever said and did against the Fascists and Nazis availed nothing to give him immunity from being tarred with the Fascist brush, or to save him from being rewarded for his war against Fascism by defeat at the hands of a triumphant British socialism.

Millions of well-meaning, patriotic, poorly informed and utterly naive Americans have accepted and joined in the use of the communist tactic of calling political enemies Fascists while America was fighting with Britain and Russia to make socialism triumphant in Europe, not excluding Britain. Little do such Americans realize that while the Big Three were fighting against the same enemy, they were not fighting for the same things. Churchill was not fighting for what England has got, socialism in Britain. America was not fighting for a Russian hegemony over Europe or communism over Europe. Leon Trotsky, a founding father of Russian communism, was denounced by Stalin and the Moscow regime as a Fascist as soon as he split with them. A Fascist is any one opposed to Stalin.

The extreme leftists not only use the tactic of calling all their opponents Fascists, but they also believe in and practise the use of the judicial and law enforcement functions to crush all opposition. Both tactics are incompatible with the American and British tradition of the past hundred years though they are in the tradition of the French Revolution and of many subsequent dictatorial regimes in Europe and elsewhere throughout the world. To communists, truth and justice are whatever in the given case best serves the interests of the communist revolution. According to them it can never be justice to acquit a political opponent in a political trial if his liquidation will serve the ends of the revolution and the party better than his acquittal. The question for a communist court is not "Is the accused innocent or guilty?" but "Will the liquidation of the accused be useful to our cause?" To communists, fair play is a snare and a delusion. For them the only function of a court trial of political enemies is to implement the purposes of the party and, usually, to dramatize and propagandize the extinction of class or political enemies. Under communism the courts are weapons of political warfare. Under communism there can be no civil liberties for there can be no lawful opposition to the ins and no lawful advocacy of a change of the regime. Rogge thought the same thing went for America.

After the German attack on Russia in May, 1941 the official Communist party publications in this country began a campaign to have the Department of Justice prosecute all persons the party leaders called Fascists. This clamor would have had little effect had it come only from the Stalinist followers. The Roosevelt Administration made several moves against communists like Earl Browder and alleged communists like Harry Bridges. But it never followed through on such moves. The communist cause, that of Moscow, is not well served in America by the official leaders and enrolled members of the Communist party except in so far as they are able to work through persons and groups who or which are not communist. What contributes most to the service of Moscow's ends is the espousal of communist ideas, directives and propaganda lines by moderate liberals and conservatives with a leftist orientation. Many of these most useful allies of Moscow do not realize that they are its allies. Consequently no criminal or legal charge could possibly lie against them. Often they combine service of Moscow's purposes with harsh attacks on Moscow, Stalin and the whole-hog communists. It is such people who are most useful to the communist cause in bandying about the Fascist epithet.

The communists accomplish more through the instrumentality of ideas than through personalities. But it would be ridiculous to try to prove that most ideas the communists use are peculiarly, distinctively or exclusively communist ideas. That is the sort of fallacy that helped wreck the government's case in the Sedition Trial. That is the fallacy of the Lasswell method of propaganda analysis. Calling an opponent a Fascist is not what might properly be termed a distinctively communist idea. It is an idea or practise the communists have found useful and followed. Other groups, in no way communist, have done the same, without a communist intent. Only it makes sense for the real communists while it does not make sense for the others. Communists can only hope to come to power through revolutionary violence and the breakdown of due process of law. Most of the people who do a lot of Fascist name-calling would be among the first to be liquidated if the communists won out. These people are extremely foolish to use and encourage use of an unfair tactic which, in the long run, can only prove disastrous to them and their kind as well as to the much maligned few who for the moment are being smeared as Fascists. But, whom the gods would destroy, they first make mad. History shows that every class about to be liquidated contributes more to its own destruction in the pre-revolutionary preliminaries than its class enemies.

Among the more influential and respectable users of the communist tactic of calling an opponent a Fascist may be listed individuals as respectable and high-placed as former Vice-President Wallace, who is far from being either a communist or a socialist of the Norman Thomas variety.

In April, 1944 the *New York Times* asked Vice-President Henry A. Wallace for an article answering the following three questions: What is a Fascist? How many Fascists have we? How dangerous are they?

His reply was published in a full length article in the magazine section of *The New York Times,* Sunday, April 9, 1944 just a week before the Trial started. He answered the first question above as follows: "A Fascist is one whose lust for money or power is combined with such an intensity of intolerance toward those of other races, parties, classes, religions, cultures, regions or nations as to make him ruthless in his use of deceit or violence to attain his ends." He then goes on to say that, on the basis of that definition, "there are undoubtedly several million Fascists in the United States." But he has another and a narrower definition of Fascist for America. He says: "There are probably several hundred thousand if we narrow the definition to include only those who in their search for money and power are ruthless and deceitful." He added "most American Fascists are enthusiastically supporting the war effort," though he hastens to add that they do it for selfish reasons. (Rogge's contention was that the essence of Fascism was causing insubordination in the armed forces, which did not square even with the dictum of Fascist-baiter No. 1, Henry A. Wallace.) Wallace went on to say that "many people whose patriotism is their proudest boast play Hitler's game by retailing distrust of our allies and by giving currency to snide suspicions without foundation in fact." Wallace might as well have come clean and said that, in his opinion, all who opposed his nomination for the Vice-Presidency in 1944 were American Fascists. Another New Dealer, Jerome Frank, now a judge of the New York Federal Court of Appeals, discussed Plato as a Fascist in a book review. (57 *Harvard Law Review,* 1944, p. 1120.)

The authors of this book have no disposition to quarrel with any man's own definition of the term Fascist or Fascism. We have no definition of our own to advance. We think every citizen has a right to use words as he pleases or to mean anything he wants them to mean. The Supreme Court, Justice Frankfurter writing the opinion, has held that calling a man a Fascist gives him no cause of action, as the term is merely a political epithet in current use. But we do insist that a term defined and used as the Vice-President of the United States while in office used it just before the Sedition Trial or as Rogge used it in the Sedition Trial cannot properly be made a part of any criminal charge. No court of law can pass on the truth or falsity of allegations about people worded in the terms Wallace uses to define a Fascist. It is perfectly all right for any one to say that John Smith is a bad man. But no court of law can try John Smith on the charge of being a bad man. Britain detained Sir Oswald Mosley and others under paragraph 18 B of the Defense of the Realm Act during a period of the war on the ground they were potentially dangerous. But the British were not idiotic enough to try them on the charge of being potentially dangerous.

To show how confused are the most intelligent spokesmen of the people behind the Trial as to the function of law enforcement under our theory of government, we quote the following from the New York *Nation,* one of the leftist organs behind the Trial, written just after the Trial ended:

> The mass sedition trial has seemingly come to an end as the result of the death of Judge Edward C. Eicher . . . But instead of attempting to convict twenty-six ill-assorted crackpots in one trial, and thus encouraging delaying tactics by the defendants, the government would do well to prosecute the most dangerous of the defendants individually and make sure that they are at least put where they can do no further harm. (*The Nation,* December 9, 1944.)

In the first place, it is silly to call crackpots dangerous. In the second place, it is contrary to the theory of law enforcement to prosecute except for the commission of unlawful acts, hence the irrelevancy of the idea that the defendants are dangerous. Finally, how can an intelligent editorial writer imagine that, as a practical matter, twenty-six persons could be tried separately—or a lesser number, separately—on a charge of conspiracy? A jury could not find one person guilty of conspiracy unless the existence of the conspiracy had been proved. It would take as long to prove the existence of the conspiracy in each case tried separately as it would if several defendants were tried together. Possibly this editorial writer had in mind re-indicting certain defendants on a new and substantive charge. He apparently did not realize that the reason for trying a large number on a single conspiracy charge which did not have to allege a single overt act was that the government lacked evidence on which to base a substantive charge. And probably he also knew nothing about the statute of limitations.

Practically all of these leftist personalities, publications and organizations which asked for the Sedition Trial, with the exception of the corporal's guard that did so in accordance with instructions from Moscow, did so in the naive belief that they were thereby contributing to the winning of the war. For those following the Moscow line, like *The Nation,* one of whose editors, Louis Fischer, resigned in June, 1945, giving as his reason the fact that *The Nation* was following the Moscow line, the tactic of holding political trials of persons called Fascists or of calling one's opponents Fascists makes sense. But the many leftists or socialists who follow the Moscow line of calling opponents Fascists would, like Trotzky and thousands of original Leninists, be liquidated by a triumphant communist revolution, exactly as Alexander Barmine, an ex-Stalinist, points out in his latest book, *One Who Survived.* The non-Stalinist leftists who have been clamoring for the prosecution of the defendants as native Fascists should rather have been standing up for the civil liberties of these defendants on the sound calculation that some day they too may be under communist indictment as Fascists, exactly as happened to Trotzky and tens of thousands of other early communists. But it is easier to swim with than against the stream.

Many prominent leftists like Eugene Lyons, Louis Fischer and Milton Mayer, have frequently and repeatedly in published writings recognized and denounced the evil and danger to men of their type inherent in the Moscow tactic of calling an opponent dangerous and a Fascist and then lynching him in a political trial on this charge. But the voice of reason has little chance of being heard above the tumult caused by the cries of passion.

Leftist labor leaders have been particularly insistent about the Sedition Trial. For them it was a "must" project. It was reported in PM of June 16, 1945 that Philip Murray, head of the C.I.O. had written Attorney General Biddle urging him to revive the Sedition Trial, and that Biddle had replied to this spokesman of a large bloc of New Deal votes that such was the intention of the Department of Justice, the matter then being enirely one of getting a trial date set by the court.

We could fill several volumes with data showing the close collaboration between high officials of the C.I.O. and the Communist party, both in this country and in Europe. We do not, however, charge the C.I.O. with being in a conspiracy with the communists of the world, as the communists have charged the defendants with being in conspiracy with the Nazis or Fascists or anti-Semites of the world. We do not believe in such world conspiracies or that everyone who works with another political group is conspiring or in agreement with that group. It is our opinion that American labor leaders who join the communist lynch cry against certain Americans, like the defendants, are the dupes rather than the co-conspirators of the communists. These labor union leaders, like Sidney Hillman or Philip Murray, would not last long under a communist dictatorship. They are able to achieve power and influence here precisely because of the civil liberties and rights which they would deny to the defendants. They are communist dupes rather than co-conspirators. To act foolishly or even maliciously on the evil suggestion of another is not necessarily or usually to be in conspiracy with him. The communist cause owes more to its dupes than its small band of enrolled members.

II. The second major group of people behind the Trial is that of the Jews and certain aggressive champions of the Jews among non-Jews. The significant fact about the demand for the prosecution of these defendants that has come from Jewish organs such as *The New York Evening Post* or *The B'nai B'rith Messenger* is that these people state frankly that the purpose of the prosecution is to combat anti-Semitism. The *Messenger* of December 15, 1944, just after the mistrial, said:

> Since the entire reason for the trial was to educate the public into the ways and means of Nazism, to link anti-Semitism and other racisms with the Hitlerian movement, to point out the dangers of demagoguery, this lack of cooperation from the principal medium by which the people could be reached was a fundamental set-back.

Victor Riesel, columnist of the Jewish *New York Evening Post*, wrote about the same time, December 8, 1944: Biddle would be doing a great injustice to liberals, to labor and to religious minorities if he quashed these indictments.

The same organ of the same people wrote on its editorial page the same day in a leader captioned Biddle's Failure:

> If he drops the case, he will greatly complicate the difficult period of post-war adjustment, when race and economic tensions will be at their height. . . . The problem of the mistrial is Attorney General Biddle's. But there would be no such problem today if he had handled this case properly to begin with.

The above criticism of Biddle is base ingratitude and most unfair. It shows what a public servant gets for attempting to do dirty work to the satisfaction of minority pressure groups. Biddle did the best anyone in his position could do to carry out the wishes of the people behind the Trial. They simply did not appreciate the difficulties of railroading to jail their political enemies without evidence of any acts in violation of the law.

Having stated that certain Jewish and pro-Jewish groups, leaders and spokesmen were one of the three major groups of people behind the Trial, the authors hasten to state with all possible emphasis that they do not claim that these leaders and spokesmen of the Jews constituted a majority of the Jewish people or spoke with the approval of such a majority. One of the worst things the war has done to the Jews has been to cause a wave of intolerance to sweep over a majority of their leaders. No people needs tolerance more. No people has more reason to fear intolerance. The war has amplified the voices of the Walter Winchells and stifled the voices of the Arthur Garfield Hays.

One of the most important Jewish organizations behind the Sedition Trial was the B'nai B'rith. Getting the federal government to stage such a trial, like getting America into the war, was a "must" on the agenda of the fighters against isolationism and anti-Semitism. At the sixteenth convention held approximately eight months before Pearl Harbor, the chairman of the Anti-Defamation League of B'nai B'rith, Mr. Sigmund Livingston, submitted a written message wherein he rationalized American entry into the war as a necessary step for combatting anti-Semitism. He stated, "No nation can stand by, oblivious to the perpetration of a great national wrong [the persecution of the Jews by the Nazis] without becoming an accessory to that wrong, if it has the power, either solely or jointly with others, to stop or remedy such wrong." Thus he enunciated the doctrine that any American who upheld traditional American neutrality was an accessory to the crime of anti-Semitism in Germany. The Anti-Defamation League increased their expenditures from $125,000.00 a year for three preceding years to $800,000.00 for the year 1941.

This minority pressure group to get America into the war and to persecute those who opposed such a policy for this country described its activities in the following terms:

> We commend the work of the League in furnishing information to newspapers, magazines, and other agencies concerning our problems, and we urge the continuance of this project. We also look with favor on the work of the League in indexing, tabulating, and getting biographical data on individuals and organizations carrying on subversive activities in this country. Such information has been of great value not only to the League but likewise to the constituted authorities in carrying on their work. It seems almost incredible that an organization the size of the League could have tabulated, indexed, and obtained information on the 50,000 persons and organizations which are now catalogued in its files.

This minority pressure group not only maintained its own secret police and spy service, to aid the authorities, of course, in suppressing subversive elements, that is to say, those who opposed American entry into the war and who criticized the Jews, but it went in heavily for propaganda.

> Your Committee is particularly impressed with the League's accomplishment in that most important field of public education, the radio.

Commenting on the "educational" work of the Anti-Defamation League, its national director, Richard E. Gutstadt, stated:

> I think the report submitted speaks for itself. The program of education which we have slowly and arduously developed, covers every media for improving the human mind. I say, without any desire to have it appear that the League is immodest, that in the several fields which have engaged the League's attention for enlightening the public mind, we have developed the outstanding agencies of America by general recognition. (Applause). We have the greatest speakers' bureau ever organized in this country, admittedly from the words of the leaders of the professional forums; we have the outstanding radio program in all the history of American radio—the transcription program I refer to. We have the most effective book placement bureau in the entire nation, and that is upon the authority of educators. Our fact-finding department's accomplishments are well known to you and need not be detailed.

We see the same pressure group operating on another plane in the report in the *Washington Post* of October 7, 1945, exactly ten months after the Sedition Trial had ended in a mistrial, that House Rules Committee Chairman Adolf J. Sabath, Democrat of Illinois, had stated with reference to a revival of the Trial: "I'm giving the Attorney General until Tuesday to do something and if he doesn't I will."

Congressman Sabath is reported to have said that he believed prosecution should be dropped against defendants who have seen "the error of their ways" and are no longer engaged in seditious or un-American activities.

> But I want the ringleaders and every last one of those still engaged in any movement designed to undermine our democratic government brought to trial and punished.

The charge in the Sedition Trial was not "un-American activities." It was conspiring to cause insubordination in the armed forces. Congressman Sabath undoubtedly meant that he wanted any defendants in the Sedition Trial retried who continued to express anti-Semitic views. For him, the Trial was a legal means of combatting anti-Semitism. It is unfortunate that so many Jewish leaders do not see that their group should be the last minority to favor political persecution for the expression of unpopular opinions. They, of all people, should always stand for due process of law, fair play and free speech—for others besides themselves.

As an example of how the Jewish community reacted to questions of tolerance in its less pathological moments, we quote the following from an article written by Arthur Garfield Hays in the Jewish *Post*:

> A few years ago in New York city there was a charge of criminal libel against Robert E. Edmondson (one of the defendants in the Sedition Trial), based upon vicious and continuous anti-Semitic pamphlets which he circulated. *Emotionally the prosecution pleased us.* A man like Edmondson no doubt belongs in jail or perhaps in a lunatic asylum. We failed to realize that it might be a mistake to make a martyr of him and that no propaganda speaks so loudly as that which emanates from prison walls. On further consideration, Jewish groups felt that a trial of the case would have pernicious effects. In support of a motion to dismiss the indictment, briefs were filed by attorneys for the American Committee on Religious Rights and Minorities, the American Jewish Committee, the American Jewish Congress, the Human Relations Committee of the National Council of Jewish Women, as well as the Civil Liberties Union. These briefs argued that the protection of a free press and of religious liberty was more important than the conviction of the defendant.

At that time the Jews were, as Hays says, *"emotionally pleased"* by the indictment of Edmondson, but their better judgment triumphed over their emotions. So the trial was stopped by the authorities, who, apparently, in such matters try to keep the Jews emotionally pleased. But when Edmondson was again indicted in the Sedition case, Jewish emotions triumphed over Jewish better judgment. And the authorities, as usually happens in such cases, aimed to please the Jews.

At the time this book was being written, midsummer of 1945, the people behind the Trial were far from crying quits. They were still insisting, over eight months after the Trial had ended in a mistrial, that a new trial be immediately started. An example of this clamor may be seen in the telegram sent to Attorney General Biddle on December 21, 1944 by the National Committee to Combat Anti-Semitism, headed by Emanuel Chapman, Chairman of the Executive Board. Congressmen Emanuel Celler and Samuel Dickstein, Bishop Wm. R. Cruickshank, James W. Gerard and fifteen others are named among the members.

This telegram appeared in the issue of December 21, 1944 of *The Sentinel,* a leading Jewish weekly news magazine, published by J. I. Fishbein in Chicago. It is given at length on the full page back cover of the weekly under the heading:

DEMAND SEDITION TRIALS CONTINUE.
BIDDLE URGED NOT TO FREE TWENTY-SIX
PRO-NAZIS.

There followed extensive editorial comment on the twenty-six "dangerous defendants" and "their treasonous plans for bringing Fascism to the United States."

A few selections from this long telegram will suffice to show the reader how the Committee and *The Sentinel* feel about the Trial.

> We have viewed with alarm the fact that the twenty-six persons indicted for treason have used their trial as an open forum for anti-Semitic and other seditious propaganda. . . . Prosecutor O. John Rogge in his opening statement to the jury at the beginning of the trial clearly showed that these people are as guilty of treason today

> as Benedict Arnold was in his day. You would be remiss in your duty if a new trial was not immediately commenced. . . . All the defendants used anti-Semitism as Hitler used it, not merely against the Jews, but against every individual. . . . The time and money spent by our country in the past eight months in prosecuting these dangerous criminals should not be wasted. We demand a new trial be started at once and that the defendants be brought to the bar of justice as historic examples to the world that those who betray our beloved country pay the price for their iniquity. . . . We must make these criminals pay before we have our black day. We must learn from the lessons of the world. We must act now.

Not even Rogge in his wildest moments, not even in his opening statement, as we shall see, called the defendants "traitors," or said that they were "guilty of treason." Of course, Rogge, in his opening statement, did not attempt to prove the defendants guilty of anything. This particular committee, presumably, did not know that the evidence and not the opening statement of the prosecutor is supposed to prove the defendants guilty. The prosecutor's opening statement merely outlines what he expects the evidence to show. The fact that this pro-Jewish committee assumed that a prosecutor proved the accused guilty shows how the minds of the members of such a committee work on the subject of trial by jury. By claiming that Rogge had proved something in his opening statement, this pro-Jewish committee admitted that nothing had been proved in the seven and a half months of trial.

The above quoted statement of the pro-Jewish Committee was highly libelous about the defendants who were pronounced guilty before their trial was over, not only of the charge on which they had been tried but also of other charges not brought against them. Such is the sense of fair play and justice of a typical committee to combat anti-Semitism. On June 28, 1945 nine of the defendants thus libelled had brought suit, alleging that the direct statements and innuendoes contained in this article falsely charged that they were traitors to the United States, engaged in seditious activities, dangerous criminals and pro-Fascists while the country was at war with the Axis powers.

It might be supposed that a responsible news magazine would never publish anything detrimental to the good name and reputation of a person without having rather definite proof of the truth of such allegations. Not so in this case. *The Sentinel* and its two editors sued were served by the sheriff of Cook County, Illinois, on June 29, 1945; so that, under the rules of the court, they had until August 6, 1945 to file their answer or motion to strike the complaint. However, their attorneys appeared in court July 27, 1945 and secured an order from the sitting judge granting them until January 7, 1946 to answer or move to strike on the grounds that their clients would now have to investigate the facts they had alleged in their article, taking testimony from witnesses all over the country. Thus these defendants against a libel suit admitted that they had published vicious libels of American citizens without, at the time of such publication, having any proofs in their possession of the truth of their allegations. What a confession! But this is typical of all the extremists who glibly denounce the defendants in the Sedition Trial. When asked: "What are your facts?" or "Where are your facts?" they are invariably stumped. They are forced to admit they have none. Well, in a lynching, the members of the mob never, as a rule, have any facts.

Some readers, possibly, may have heard over the radio all through the Trial and following the mistrial the weekly comments of Walter Winchell about the Trial and the defendants. After the mistrial he repeatedly demanded and predicted a new trial. In predicting a new trial, he tried to simplify matters for the government by reducing the new number of defendants to be tried from twenty-six to ten and by nominating his own candidates for the new list of ten. He contributed further by setting at least three separate months in which the Trial was to start. The first month was March, 1945, the next was June and, at the time of writing this book, and he had the Trial set for a beginning in September. He climaxed his intervention in this case by appealing to his listeners to deluge Washington with demands for a new trial. There is no doubt that many of his public did so. And it is possible that this flood of Winchell-inspired communications may have had to do with Biddle's statements about a new trial, which he kept putting out right up to the date he was given the gate by

President Truman, much to his chagrin and the disappointment of the people behind the Trial.

III. The Internationalists behind the Trial are not as easy to link with definite agitation for this prosecution as are the leftists and the Jewish groups. To call the role of the institutions of religion, learning, culture, enlightenment and propaganda for various types of international idealism, would be to publish a directory of a large book size. In general, the internationalists are all those who crusaded to get America into the last world war and into this one, into Woodrow Wilson's League of Nations and into the present World Security Organization.

These internationalists are not agreed as to what they are for but they are agreed as to what they are against. They are against sin, Fascism and isolationism. They are against the foreign policy of Washington's Farewell Address. They are against the defendants because the latter represent the most aggressive and determined opposition to internationalism to be found in this country.

Many of these internationalist organizations, the Rockefeller or Carnegie or several other heavily endowed foundations, for examples, are conducted on an extremely high level of scholarly research and cultural propaganda. Such organizations would not openly come out for a witch hunt such as the Sedition Trial. But they condition the minds of the more influential people to regard anyone opposed to American intervention all over the world as a public enemy.

Some of the internationalist organizations, however, are conducted with as much fanaticism and intolerance as the official Communist party, the Ku Klux Klan and several of the organizations named in the indictment. Freedom House and the Wilkie Memorial are recent examples of these internationalist organizations. The Carnegie and Rockefeller Foundations are older and longer established examples. The key to their policy, ideology and general slant may be found in the following two sentences taken from a full page advertisement which Freedom House ran in *The New York Times* and *The New York Herald Tribune* on January 30, 1943:

> First, we must win the war. Second we must destroy isolationism forever and play our full part in preserving the peace.

It is all packed into that last sentence: "We must destroy isolationism forever and play our full part in preserving the peace." Only fanatics talk of destroying forever a political or religious idea with which they disagree. The two party system in England and America operates on the basis of a different theory. The idea that in the matter of political ideas or beliefs there is a single body of truth about which all good people are agreed and that everything outside that body of truth is error, heresy, sin or Fascism is incompatible with our system of government. The inquisitor of the 15th Century wanted to eradicate every heretical idea. The communists wherever in power operate on the same principle. The crusading internationalists in this country are, in large majority, especially the leaders, governed by the same idea. When the American internationalists talk of destroying isolationism forever they are talking the language of Torquemada and Stalin.

Many of these extremists, whose great passion of the moment is the carrying out of the One World idea, are former liberals who still call themselves liberal. Needless to say, intolerance and ideological persecution or suppression are the diametric opposites of liberalism. Any monopolistic morality, any universalistic religion or political philosophy, which its supporters undertake to impose on the entire world by force, is contrary to the liberal tradition of the western world since the end of the religious wars about the middle of the 17th Century.

The Roosevelt Administration owed a great deal to these crusading and intolerant extremists. Possibly the combined vote of all the extremists who clamored for a mass political trial in Washington held the balance of power in the 1940 and 1944 elections. Without hazarding estimates or guesses as to the size of this vote, one can confidently state that the Administration, by pressing the Sedition Trial, gained more votes among these extremists and their adherents that it lost among the lovers of liberty and fair play. In a word, the Sedition Trial as politics was smart. It was good politics.

CHAPTER IV.

CHOOSING A LAW.

In Chapter I we stated the questions posed by the Sedition Trial as being essentially two: Why did it last so long? Why was it such a farce? As a preliminary to answering these questions we had to consider in Chapter II the political purposes behind the Trial, namely, propaganda and intimidation against isolationism, anti-Semitism, and anti-communism; and in Chapter III, we took a look at the people behind the Trial, namely certain minority pressure groups which we divided into the leftists, Jewish and pro-Jewish and internationalist classifications. Next in order comes a brief consideration of the government's problem of choosing the instrumentalities for serving these purposes and people through the desired propaganda trial.

To get a political propaganda trial started, once the purposes are clearly established, the order of procedure is about as follows: first, you select a law around which to build a conspiracy case; second, you spin a prosecution theory to fit that law and case; third, you get as many facts and as much history and political theory as the F.B.I. and a staff of college professors can assemble to bolster up the prosecution case thus arrived at.

The Trial would have been much less farcical if only the prosecution had had a law drafted to serve the purpose of the people who wanted such a propaganda stunt. But there was and still is no law against anti-Semitism, anti-communism and isolationism or against the propagation of related ideas. The Trial, therefore, was a farce for much the same reason that a man looks silly in a suit which is a grotesque misfit.

The major purpose of this and the next few chapters will be to explain the difficulties the government encountered in the choice and use of such instrumentalities as a law, an indictment and a prosecution theory to serve the purposes and people already named. All the defense had to do in this case was to keep the fact of the misfit continuously before the court and the jury. This was easy.

To understand what happened one has only to imagine a clothing salesman trying to make a suit that does not fit appear to fit the man trying it on while several onlookers continuously give a tug here and there to bring out the ludicrous misfit or while they merely point out the obvious.

Under Moscow rules, the Trial could not have failed. Only America is not Soviet Russia. The rules of evidence are different. Moscow can charge people with being opponents of the regime in power or with being against the regime. Washington cannot do this. So, in the Sedition Trial, Washington had to charge one thing and prove another. Against any kind of a defense, that must prove absurd. Under our system you can't send people to jail for being something or other like a Fascist. You are supposed to be able to send people to jail only for having done something against the law. The prosecution task is to prove that the accused did something against the law.

In the Sedition Trial this was not the government's task at all. The prosecution task was to prove that hundreds and thousands of things the defendants admittedly said, wrote and did, each entirely lawful in itself, constituted in their entirety the offense of criminal conspiracy to cause insubordination in the armed forces. If there had been such intent, it would have been extremely easy to show by the behavior of the accused as well as by their words. The government's case consisted entirely of unprovable assertions, interpretations and inferences on inferences that anti-Semitism was Nazism and that Nazism was intent to cause insubordination in the armed forces.

To work with, Washington had laws against advocating the overthrow of the government by force and violence and against advocating, counseling, urging or causing insubordination in the armed forces, but no law against the isms or ideas named in the indictment or talked about during the Trial. The principal laws Washington had to work with are the following:

> 1. The Espionage Act of 1917, applicable only to acts committed in time of war, the pertinent sections of which read as follows:
>
> Title I. Section 3, now 50 U.S.C. 33.
>
> (1) Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of

> the military or naval forces of the United States or to promote the success of its enemies,
> (2) and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, (3) or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

2. The Sedition Act of June 28, 1940, usually called the Smith Act and somewhat misleadingly entitled the Alien Registration Act, one of the provisions having to do with the registration of aliens. The pertinent sections read as follows:

> Section I. (18 U.S.C. 9).
> Section 1. (a) It shall be unlawful for any person, with intent to interfere with, impair, or influence the loyalty, morale or discipline of the military or naval forces of the United States—
>
> > (1) to advise, counsel, urge, or in any manner cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
> > (2) to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

3. The Foreign Agents Registration Act, originally enacted in 1938, and amended in minor particulars in 1939 and more extensively in 1942. Its policy and purposes are expressed in the 1942 amendments as follows:

> It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be

> informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.

4. The Selective Service Act of 1940 which carries penalties for obstruction to its provisions. (Paragraph 11 of the Selective Training and Service Act of 1940, 50 U.S.C. App. 311.)

Two of the thirty defendants, William Dudley Pelley and Gerhard W. Kunze, had been convicted and sentenced in separate trials to fifteen years each for violation of the above quoted sections of the Espionage Act of 1917, which provisions, as Professor Chafee points out in his classic text FREE SPEECH IN THE UNITED STATES (1941 edition, page 447) are "substantially similar" to the above sections of the Act of 1940 under which these two men were again tried along with the twenty-eight other defendants. For all practical purposes the chief difference between the Sedition section of the Espionage Act of 1917 and the Sedition section of the Smith Act of 1940, in so far as propaganda is concerned, is that the Act of 1917 applies only in wartime, while that of 1940 applies in peacetime as well.

The only good reason, it would seem, why the Department of Justice tried Pelley and Kunze twice for substantially the same offense was that of creating prejudice against the other defendants and in favor of the government's case.

Another defendant, George Sylvester Viereck, a German-American author, who had worked for the German Library of Information in New York and other German principals before Pearl Harbor, had been tried and convicted and was serving a sentence under the Foreign Agents Registration Act, not for failure to register as a German agent—he had registered—but for failure to make in his registration statement what the government contended and the court held was a required disclosure under this law of all his activities as a German agent. The Department of Justice has the following to say about Viereck in a report in June 1945 to Congress on the Administration of the Foreign Registration Act:

> The evidence showed that Viereck failed to disclose that he acted as political adviser and public-relations counsel to the German Foreign Office, and that, as such

agent, he received pay from the German Consulate in New York; that he failed to disclose that he sent weekly reports to the German Foreign Office; that he failed to disclose that, as such agent, he had subsidized Flanders Hall, Inc., in the publication and distribution of a series of anti-British and isolationist books; that he failed to disclose that, as such agent, he had been chief financial contributor to several committees engaged in isolationist propaganda and had used Congressional franking privileges for the dissemination of such propaganda.

Three German-American defendants, other than Viereck, had been convicted of obstructing the draft, but those convictions were reversed by the Supreme Court over a year after the Sedition Trial had started.

Two American defendants had also been convicted twice on sedition charges, once under a federal and again under a state indictment. The convictions of these two under the state sedition law were set aside by the California Supreme Court several months after the Sedition Trial at Washington had ended in a mistrial.

In view of the above laws and the record of scores of convictions during the war of persons charged with violations of one of the federal or state sedition laws and of the Foreign Agents Registration Law as well as of the Selective Service Law, it may be said that wherever there was any evidence to support a case, convictions had been quick and easy. As to whether such laws and such convictions are constitutional or in accord with due respect for freedom of speech and civil liberties, the authors of this book do not here undertake to express an opinion. We are not here concerned with the individual defendants in the Sedition Trial, their case histories or any question as to whether each one had violated any law or what law or laws he had violated. We merely state that three native born Americans and four German-Americans of the original thirty defendants were serving sentence during the trial for offenses under one or more of the four laws named above while they were being tried for an alleged offense under the Smith Act of 1940—the offense of conspiring to cause insubordination in the armed forces—the charge in the Sedition Trial.

These explanations are preliminary to the statement that the government's problem of getting the desired mass Sedition Trial started was largely one of rigging a prosecution which would get persons who could not have been indicted for specific acts of omission or commission under existing laws on account of the utterances and activities which the people behind the Trial wanted penalized. The government had plenty of law to get at certain kinds of activities and utterances, and it had had plenty of convictions under such law, in cases in which it had had evidence. But the Sedition Trial presented a difficult problem, that of proving that certain ideas were criminal without a law so stating. The government chose the Smith Act, or Number 2 in the above enumeration, as its legal instrument to serve the purposes and people behind the Trial.

To cook up the desired prosecution the government had to use two principal legal ingredients: a federal law and the conspiracy formula. The present state of conspiracy law is the result of development over the past three decades of American criminal law administration. The conspiracy formula has been developed by the courts rather than by legislation. It has been developed mainly to get notorious and elusive offenders in the fields of bootlegging, the vice traffic, various types of extortion commonly known as racketeering and, last, but not least, big business practices in alleged restraint of trade and competition. In all these conspiracy prosecutions which have created the existing state of conspiracy law, the reason for choosing and using the conspiracy charge formula has been that the prosecution has lacked evidence to prove a substantive charge.

The general theory behind most recent and current use of the conspiracy formula is that where the prosecutor lacks evidence to prove that given persons committed an unlawful act, the prosecutor nearly always can prove that they *conspired* to do something unlawful—either to seek an unlawful end or to use an unlawful means to a lawful end. The main reason why it is easier to convict for conspiracy than for the commission of an unlawful act has to do with the laxer standards for admitting evidence in conspiracy cases. In conspiracy cases almost anything can be thrown in as evidence as tending to link the accused or to impute evil motives to them. Because the conspiracy charge is so easily abused by overzealous and unscrupulous prosecutors, who proceed on the theory that the end always justifies the means, the British now use it very little, their courts having in recent years initiated drastic reforms covering its use.

With a conspiracy charge against a much and unfavorably publicized figure like a notorious bootlegger, gangster or critic of the New Deal or the Jews, it is usually easy to convict by confusing the issues and prejudicing the jury against the defendants as a lot of bad eggs. Evidence that is mainly prejudicial and that could not be admitted in a criminal trial for the commission of a substantive act can be put in against persons charged with conspiracy. People who believe that the end always justifies the means and who say that the conspiracy charge is the only way to convict certain bad people, make out a strong case for this growing abuse.

The reader's attention is called to the fact that under federal law, normally, it is necessary, in order to prove a conspiracy, to show the commission of an overt act by one of the conspirators. An overt act is some act performed by a conspirator in furtherance of the conspiracy within the jurisdiction of the court in which the case is being tried. Showing this is called by the lawyers proving venue in the given case. It so happens, however, that in the act under which the defendants were indicted a conspiracy charge does not require an overt act. That is, doubtless, an important reason why the government selected this particular act, for in the seven and a half months of the Trial the prosecutor was never able to show one overt act in the District of Columbia on the part of any one of the defendants, that is to say, in legal language, the prosecution failed to show venue.

Whatever the merits of the conspiracy charge for use against gangsters or racketeers, the use of this instrumentality against citizens for their political or social ideas, teachings, utterances and activities is an entirely different matter. The conspiracy formula is of capital importance for civil liberties wherever it is used in connection with a political charge. Hence, an entire later chapter is being devoted to a discussion of the conspiracy formula aspect of this case.

To mix the two legal ingredients just mentioned—a law penalizing an act and a charge of conspiring to violate that law—into a spectacular propaganda trial, it is necessary to have a good prosecution recipe or theory and a good prosecution chef, one who believes the theory and who is expert in mixing legal concoctions that few lawyers and no layman on a jury will understand. The procedure runs somewhat as follows:

First, the highest authorities decide what agitators they want to get and what political purposes—educational, of course, as they would put it—they want to serve by getting these individuals through a criminal trial.

Second, the authorities pick a lawyer who is a legal theorist of the instrumentalist school. An instrumentalist in the law is a legal wizard who regards law as a tool, not a rule. For him law is a tool or a weapon to be used in any way practical to serve the ends of the people for whom he is working. The only rule of an instrumentalist is that he must succeed or be able to get away with it. For a far-fetched political prosecution to serve extreme political purposes in an unorthodox or unprecedented way, it will usually be found necessary to get a special prosecutor who is a combination of a good legal theorist, a zealous fanatic and a bit of a nut. Such a man will be a prodigious worker. He will also give the impression of great sincerity, for he must sell himself his case to be able to sell it to the jury. He will, therefore, be lacking in a sense of humor.

Third, the legal instrumentalist in charge of the project will pick a law, around one penal provision of which he will weave a fiendishly clever conspiracy charge. The cleverer the conspiracy charge, the more people and the more unrelated the people it will plausibly involve.

Fourth, the instrumentalist in charge of the project, with the aid of the nearly limitless resources of the federal government, will spin a prosecution theory to support the conspiracy charge and to put over the propaganda the trial is supposed to make.

Fifth, the authorities, according to the directives of the people behind the trial and according to the requirements of the instrumentalist in charge, will put the F.B.I. to work getting selected facts to bolster the theory and all sorts of experts, getting facts and quotations likewise to support it.

Sixth, the project director or legal instrumentalist in charge, who will have the title of special assistant to the Attorney General, will have a lot of preliminary rehearsals working up his master production for the federal courts, more or less as a big and expensive movie production is prepared. Thus, he will work for months and months with one grand jury after another.

In working up the Sedition Trial the project directors experimented on three grand juries over a total period exceeding one year. They are regaled with a mass of testimony by witnesses and selections from documents, books, pamphlets, newspapers and all sorts of literature, carefully selected and woven into a pattern of suggestion, indoctrination and propaganda. At no time during the grand jury rehearsal will the course of propaganda and indoctrination of the twenty-five grand jurors be interrupted or contradicted by opposing counsel, argument, evidence or cross examination. Needless to say, the grand jurors succumb to the three to eight months course of indoctrination with the same thesis to which the government subjects them.

The grand jury institution is all right for normal and proper criminal charges. But for criminal charges which are merely historical and political theses supposedly to be proved by thousands of pieces of prose and bits of information, handpicked and woven into a given pattern, a grand jury proceeding is as much of a farce as was the Sedition Trial. Only the secrecy which surrounds the hearings before a grand jury keeps this farce from becoming the public scandal the Trial became.

Before the grand jury only one side is heard. And, while few, if any, members of either the grand jury or the trial jury will be prepared by prior reading, education or study to cope with the material offered in support of a particular historical or political thesis, the thesis, when presented in open court, is exposed to the critical and skeptical judgment of the press, the larger public, future historians and, what is even more important, to the immediate cross examination of opposing counsel, whereas before the grand jury, presenting the government's thesis is exactly like playing records on a phonograph. The only interruption is to change the records.

In such grand jury proceedings there can be no realistic attempt to arrive at the truth about matters which lie outside the ken or powers of intelligent evaluation of average men and women. There is merely an experimental exercise in indoctrination by the project director, or a rehearsal of the course of propaganda being prepared for the trial jury and the larger public. The grand jury proceeding is totally dominated by the government's purpose to forge a legal instrument with which to make political propaganda favorable to its political purposes, or rather those of the minorities who ordered the trial to be staged more or less as a group might order a banquet with a dance orchestra, entertainers and everything.

To appreciate just how much of an experiment in the misuse of justice as a tool of political propaganda the Sedition Trial of 1944 really was, it should suffice to consider the fact that this Trial which began on April 17, 1944 was brought on the third of a succession of indictments, the first of which was started on by a grand jury back in October, 1941 or thirty months earlier. In other words, the production had been thirty months in preparation by the project director. How can any lawyer prepare a defense in a few days or weeks against a case that has been prepared in this way? Imagine any professional man of average intelligence being called upon to contest a historical or political or scientific thesis that experts had been preparing over a thirty month period in a field with which he was unfamiliar!

The first indictment charged conspiracy to violate the seditious propaganda sections of both the wartime Espionage Act of 1917 and the peacetime Smith Act of 1940, sometimes called the Alien Registration Act. This indictment was filed on July 24, 1942. The basic charge was that the defendants had conspired to spread Nazi propaganda for the purpose of violating the just mentioned laws. The government case consisted of showing the similarity between the propaganda themes of the Nazis and the defendants. The absurdity of this method of proof will be fully shown later on in other connections, particularly in a discussion of the Lasswell method of propaganda analysis. Here let it suffice to remark that for the purposes of proving the existence of a conspiracy and guilt of participation therein, it is necessary to prove similarity of intent of the persons accused rather than similarity of content of what they said.

The indictment problem in the experimental phase running from the first of July, 1941, when the first grand jury was sworn in to work on the finding of an indictment for the desired trial, until the third indictment was filed on January 4, 1944 is one that we shall discuss in a later chapter. In this chapter we merely call attention to the fact that during the experimental grand jury phase, running over two years and through three grand juries, the government experimented with two different laws and ended up by choosing only one section of the Smith Act and one count for the indictment.

In this connection we also stress the fact that it was never for one moment a case of the Department of Justice proceeding against people against whom any one had filed a sworn complaint charging specific violations of a given law. It was a case of acting on non-legal complaints, unsworn, against certain people, charging mainly that they were anti-Semites, anti-communists and isolationists. It was a case of trying to work out a legal formula for prosecuting these people. This, in turn, was a matter of trying to find a law to fit what they had said and done, and failing to find such a law, of trying to find a legal theory by means of which to twist some existing law to fit the evidence, and the evidence to fit the law chosen for this purpose. Need we comment that where real violations of the law have been committed it does not take two or three years to work out an appropriate charge or to find a fit between the acts and some penal statute?

During all this experimental work on the Sedition Trial the Department of Justice was not getting new facts about the defendants or wringing new evidence against them from their own lips or the lips of others. The Department of Justice during the first two indictments phase was merely trying to fit what evidence it had to a law, or rather two laws, and to an indictment that would fit that law with a view to getting the case beyond the first obstacle to the final stage. After Rogge came into the case on February 7, 1943 sixteen months after the start of the project under William Power Maloney, and while both the first and second indictments were still in the works, the Department of Justice shifted to another tack: instead of trying to fit the evidence to a law, it began trying to fit the law to the evidence. As a fit either way was impossible, Rogge with true legal imagination started on the formula of first selecting his law and then assuming whatever facts he needed to support the kind of charge the people behind the Trial wanted and weaving in with these assumed facts whatever evidence he had against the prospective defendants. Understanding all this about the problem of getting a law will help one understand why certain defendants were dropped and certain new ones brought in exactly as a Hollywood director drops actors and takes on new ones in preparing a big production. The government made changes in its choice of the law, in the indictment and in the cast of actors to try to achieve the best possible show for the money, or rather, the votes, of the public the show was playing to.

Rogge's predecessor on the case, William Power Maloney, had failed largely because he tried to twist his evidence to fit a charge under the laws chosen for the indictment. The evidence would not fit, or would not support a charge that would stand up through preliminary hearings. Consequently, Rogge set out to draft a charge that would fit the law. To do this he used his imagination with history and political theory. His problem was to perfect a formula to convict people for doing what was against no law. It boiled down to choosing a crime which the Department of Justice would undertake to prove equalled anti-Semitism, anti-communism and isolationism. The crime chosen was causing insubordination in the armed forces. The law was the Smith Act. To make the indictment fit the law, Rogge assumed a lot of history that was patently false, such as the proposition in the indictment that the Nazi party had a publicly announced program to Nazify the world by means of causing insubordination in the armed forces. Rogge, of course, thought no one would ever question any historical assertion adverse to the Nazis.

Well, it is a perfectly tenable position for a trial judge on preliminary arguments over an indictment alleging that the moon is made of green cheese to hold that the government is entitled to an opportunity to prove that the moon is made of green cheese as a part of its case in support of the charge. The test an indictment has to meet in order to be sustained in preliminary arguments is that of fitting the law. Whether it fits the evidence is for the judge and jury to determine later in the course of the trial.

Rogge picked his law, assumed a large and necessary part of his evidence and produced an indictment that stood up in Judge Eicher's court against all defense demurrers and motions to quash. Thus he was able to do what William Power Maloney, his predecessor on the project, had failed over the course of more than a year to do, namely, to get the show started. In this chapter we have been concerned with the law and the section of the law he chose. To complete the explanation of why he made these choices we must put our readers off to Chapter VI on drawing the indictment. In the next chapter we offer a brief statement of the background and purposes of the law Rogge chose. This statement will make it clear why the law could not be stretched to fit the evidence against the defendants the government had to offer, or, for that matter, any evidence available against the Nazis.

CHAPTER V.

THE SMITH ACT.

One of the many ironies of the mass Sedition Trial was that the defendants were charged with conspiring to violate a law aimed at the communists and a communist tactic, that of trying to undermine the loyalty of the armed forces. What makes this so ironical is the fact that many of the defendants, being fanatical anti-communists, had openly supported the enactment of this law. The moral is one of the major points of this book: laws intended to get one crowd may well be used by them to get the authors and backers of the law. This is just another good argument for civil liberties and freedom of speech.

Any law against subversive or seditious words can be used against any words uttered in opposition to prevailing policies, doctrines or plans of those in power. Anything effective said or written with a view to bringing about a change of persons in office or policies in force can be interpreted or made to appear subversive or intended and calculated to impair the loyalty of the armed forces—to their commander in chief and his officials, to our existing institutions and to the government. How can one criticize government officials or policies with a view to changing them without impairing confidence in them, without creating disloyalty to them? Of course, as defense counsel often pointed out, the officer's oath of loyalty is to the Constitution, not to the existing pattern of institutions as Rogge's argument to the jury in his opening made it appear. And the Constitution guarantees the right to denounce the President and demand change both in our public officers and our public policies.

On a narrow and proper construction of the Smith Act the only kind of advocacy or propaganda that would be considered criminal would be advocacy of the overthrow of the government by force and of military mutiny or insubordination. On such construction, Rogge's entire case would have been thrown out both on the indictment and the bill of particulars. But the law, loosely construed, can be held to penalize any criticism of the government or the President as being intended to impair the morale of the armed forces who may hear such criticism and be led by it not to hold their commander in chief and his policies and acts in proper esteem. The United States Supreme Court in reversing the conviction of Hartzel laid down the rule that in free speech cases the language of the penal statute invoked must be strictly and not loosely construed (*Hartzel* v. *U. S.*, 320 U. S. 756).

The Smith Act of June 28, 1940 might have been drafted to get at so-called native Fascists, isolationists, anti-Semites and anti-communists. But it was not. Why, need not here concern us. Suffice it to say that the law was aimed at communists and orthodox communist propaganda. About this act Professor Chafee in his *Free Speech in the United States* says on page 441, "Not until months later did I for one realize that this statute contains the most drastic restrictions on freedom of speech ever enacted in the United States during peace."

The Senate Judiciary Committee in 1940, Senate Report page 1-2, set forth the purposes of this statute in the following terms:

> (1) To prohibit the advocacy of insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States.
>
> (2) To prohibit the advocacy of the overthrow or destruction of any government in the United States by force or violence.
>
> (3) To add several additional grounds for the deportation of aliens to those already provided by law.
>
> (4) To permit the suspension, subject to congressional review, or deportation of aliens in certain "hardship cases" when the ground for deportation is technical in nature and the alien proves good moral character.
>
> (5) To require the registration and fingerprinting of aliens.

There is nothing about anti-Semitism in the listing of purposes of the law. Only the first purpose listed above need concern us as it was the section of this law relating to causing insubordination in the armed forces that the defendants were accused of having conspired with the

Nazis and with each other to violate as a part of a world-wide Nazi movement of ideas or of something to overthrow democracy everywhere and replace it by Fascism or National Socialism. Careful perusal of the reports of hearings and testimony in relation to this piece of legislation will disclose no expression of Congressional concern over native Fascists or anti-Semitism. The only opponents of the passage of this law to appear before Congressional committees were Osmond Fraenkel for the American Civil Liberties Union, Ralph Emerson for the C.I.O. Maritime Union, which has frequently been linked in charges with the communists, its head, Harry Bridges, having been ordered deported as a communist, and Paul Scharrenberg for the American Federation of Labor.

Now for the reason given in the hearings and reports on the bill for the section under which the defendants in the Sedition Trial were indicted. Acting Secretary of the Navy Edison, in a letter quoted by Senator Walsh, 84 Congressional Record 2122 (March 2, 1939), wrote:

> Literature of a subversive character has been distributed in increasing quantities in recent years to the personnel of the Army and Navy. The literature, apparently emanating from communist organizations, seeks to undermine the morale of the services by urging disloyalty and disobedience of laws and regulations for the government of the armed forces.

To show the sort of thing this law was intended to curb we may refer to the testimony of a naval officer, Commander Clement (1935 House Hearings, page 19), as to communist tactics when the fleet was in San Francisco on Navy Day in 1934:

> Small groups, consisting of, say two men and three girls, will come aboard ship with the regular crowd of visitors and sightseers. The men of this group will circulate about the decks, stuffing their handbills into boats, behind ventilators, and so forth, where members of the crew eventually find them, read them, and then generally turn them over to the executive or the officer of the deck. Meanwhile the girls of the group—chosen for their good looks—will be picking out promising appearing enlisted men, engaging them in conversation with the object of making dates with them ashore and working on them

there to convert them to the "cause" and thus gain a recruit within the ship's company. Once gained, a cell is formed through which others may be talked over into joining.

The following passages are examples of the communist propaganda against which the law was aimed, one sample of which was not produced against the defendants during the seven and a half months of the Sedition Trial:

> You must refuse to fight in the interests of the bosses! When you are called into war, follow the example of the Russian soldiers and sailors. Use your military training against your real enemy, the capitalist class that exploits us and plunges us into wars! You must refuse to fight against the Soviet Union.
>
> Young sailors, you are our class brothers, although the bosses try to use you against your class. We call upon you to be loyal to your class brothers, whether in this country or abroad—to follow the glorious tradition of the French sailors in 1918, who refused to attack the Soviet Union, and the Kronstadt sailors who were the driving force that carried through the glorious Russian revolution, which built the first workers' and farmers' government.

The case for this law was stated about as well as it can be in the majority report of the 1935 Military Affairs Committee, submitted by Chairman J. J. McSwain of South Carolina: (1935 House Report, pages 1-4).

> It must be carefully noted that this legislation is not addressed to propaganda circulating among the citizenry generally. It is addressed solely and exclusively to a sort of "intellectual insulation against disloyalty" of the men who have specially contracted to be instantly prepared, in mind and in body, for the defense of the Government of the United States against its foes, whether foreign or domestic. . . . Loyalty is the very essence of an army and navy. We all know that loyalty can be undermined and destroyed by subtle, sinister and subversive propaganda. . . . Therefore, since national defense forces are necessary, we must punish those who deliberately seek by subtle and sinister persuasion to undermine the loyalty and sense of duty of our soldiers and sailors.

Against this opinion Congressmen Maury Maverick of Texas and P. M. Kvale of Minnesota brought in a vigorous minority report containing passages like the following (1935 House Hearings pages 15-17):

> Twenty-eight thousand communists overthrowing the Army and the Navy! Worse than being nonsense, however, is the fact that it is a direct insult to the patriotism of the enlisted men of the Army and Navy. Are we about to have a revolution? Is our Army seething with sedition? Is our Navy likely to have a mutiny at sea? To even intimate such a thing is the worst kind of folly. The mere reporting out of a bill like this morally weakens the national defenses of our country. It gives the impression that the Congress of the United States is suspicious of the Army and the Navy. It says that we do not trust our soldiers and sailors and implies that we do not trust our own citizens.
>
> What will come if such a bill is passed? Cross-currents of persecutions, hunts by hysterical false "patriots"; newspaper raids, brutal arrests on unfounded gossip; censorship by intimidatory actions, head-crackings, bloodshed, unconstitutional searches and seizures, suspicions, industrial warfare—bringing chaos rather than halting it.

Professor Chafee was right about this law when he said, in his book already quoted from, that it was a law abridging freedom of speech and of the press in time of peace.

The authors of this book are inclined to waive as futile in the present state of the Supreme Court the raising of any question of the unconstitutionality or invalidity of the anti-sedition sections of either the Espionage Act of 1917, with its amendment of May 16, 1918, or of the Smith Act of June 28, 1940. They feel very strongly that both laws should have their sections relating to so-called seditious or subversive propaganda or utterances repealed. The purposes of these laws may be all right. But the Department of Justice, in bringing prosecutions under a law of this character, does not have to be governed by the purposes of the legislators who enacted it. It can use or abuse any vague or indefinitely worded statute in any way political considerations may dictate, subject only to the limitations of what the prosecution can get away with in the given instance.

The proper purposes of these laws against seditious or subversive propaganda can be sufficiently served by long standing laws against incitement or solicitation to commit a violation of the law or conspiracy to bring about such violation. Certainly existing laws before the Espionage Act of 1917 or the Smith Act of 1940 were passed permitted prosecution of any person or group that created a clear and present danger by advocating the overthrow of the government by force or by soliciting insubordination in the armed forces.

The trouble with these sedition laws is the matter of executive discretion in the bringing of prosecutions and of judicial discretion in the admission of evidence in support of a fantastic conspiracy charge. It is too easy to abuse these laws by rigging prosecutions against unpopular minorities or political adversaries. It is no satisfactory correction for such abuse that the Supreme Court may eventually reverse an unwarranted conviction. Those responsible for the prosecution incur no penalty for their mistake or excessive zeal. The victims receive no compensation for the expense, humiliation, personal loss and time they may have to spend in jail as a result of a conviction which the Supreme Court ultimately may reverse as having been unsupported by the evidence.

Of far greater social importance, Professor Chafee points out, is the fact that such prosecutions serve to curb the kind of free discussion that the country needs to test public policies and the performances of public officials. During the debate on the adoption of the San Francisco world charter, many officials and other supporters of the charter deplored the lack of real criticism and discussion of the measure. Things like the Sedition Trial operate imperceptibly to curb criticism and discussion. Where such trials are conducted with efficiency and success, as in Soviet Russia, criticism of the basic policies of the regime in power is practically non-existent, for the excellent reasons that under such regimes political opponents are always convicted when tried and that most political opponents are either tried and shot or shot without being tried. There can be no free discussion of public policies or public officials where sedition trials are the order of the day. The moment a writer or a speaker has to think about what he plans to say in relation to sedition laws, he is automatically, even if subconsciously, curbed and inhibited in what he has to say. And it need not be the direct fear of being indicted for seditious utterance that will restrain him; it may be merely the fear of seeming to talk like those who have been thus indicted.

For instance, the law being what it is and the record of the Department of Justice being what it has been in this war, no one in the future will be able to criticize a course of public policy leading to war with a foreign power without considering seriously whether or not such criticism or propaganda may not eventually involve him in a charge of having been the agent of that foreign power or, worse still, of having conspired with that foreign power to cause insubordination among our armed forces or to obstruct the war effort of our government or to bring our government into "hatred and contempt."

Those who argue that the abuse of our present sedition laws is slight with present day Presidents and Attorneys General cannot find much support in the record of this war in which the Supreme Court has reversed no less than five judgments obtained by the Department of Justice in civil liberties case, in each instance on the ground of insufficient evidence. And the record of the first world war of this century is not one which any believer in civil liberties will try to defend.

The Attorney General has had built up for him by the liberal press a reputation as a civil libertarian which the record does not sustain. The chief differences between Biddle and the Attorney General in the last war are the following:

First, the Supreme Court and the courts of appeal have registered far more reversals against Biddle's Department of Justice in civil liberties cases than were scored in the last war.

Second, in the last war and immediately thereafter, United States attorneys throughout the country had the green light from Washington to go ahead with an orgy of prosecutions and witch hunts under the Espionage Act of 1917, so that over two thousand persons were convicted, whereas in this war Biddle has curbed somewhat the natural propensity of United States attorneys throughout the country to exploit war hysteria against unpopular groups for personal glory. This means that, under Biddle, witch hunting has been less democratic and more bureaucratic. There has been quantitatively less of it. What there has been of it has been more spectacular and more evil. The more it is attempted to legalize and rationalize a lynching, the worse is the lynching. There is more excuse for a lynching by a mob than by a local United States Attorney. There is more excuse for a lynching by a local United States Attorney than there is for one by the Attorney General or his special assistant, attempted within the shadow of the capitol at Washington.

Third, the directive idea in the sedition trials of the last war was the suppression of so-called subversive radicals who were chiefly socialists charged with conspiring to overthrow the government by force and violence and to obstruct the enlistment of soldiers, while in this war the big idea has been to suppress anti-Semitism by means of such trials.

Fourth, in the last war the liberals, almost to a man, headed by Supreme Court Justices Holmes and Brandeis, who dissented in such famous civil liberties cases as *Abrams* v. *the U. S.,* 250 U. S. 616; *Gitlow* v. *New York,* 268 U. S. 652, and *U. S.* v. *Schwimmer,* 279 U. S. 644, were against the sedition trials and their resulting convictions, while in this war the majority of the liberals have favored the sedition trials and the resulting abridgement of freedom of speech, provided the accused were charged with being Fascists or anti-Semites.

The American Civil Liberties Union conspicuously declined to take an interest in the Washington mass Sedition Trial, giving as their explanation that they had been told there was evidence to be presented showing that the defendants had been in the pay of the Germans. Not one whit of such evidence was ever promised in the prosecutor's opening statement or produced in seven and a half months of trial, except as to four defendants, and it was a very minor part of the case against them. This shallow pretext served to mask the true reasons for the refusal of the American Civil Liberties Union to take an interest in the number one civil liberties case of the war—a trial in which any impartial lawyer studying the indictment and the known historical record must have concluded that there was something wrong with the government's case. For the American Civil Liberties Union to have said anything about German money in connection with this trial, while it was either in preparation or in course, was utterly indefensible, since it would not have made the slightest difference whether any defendants had received German money or not so far as proving the charge of the indictment was concerned. One of the defendants, George Sylvester Viereck, had unquestionably been in the pay of the German Government before Pearl Harbor as a registered German agent. The charge, as the legal staff of the American Civil Liberties Union knew perfectly well, was not that the accused had been German agents. The charge was that they had conspired to cause insubordination in the armed forces.

Fifth, the assault on civil liberties by the Department of Justice under Biddle has been more subtle and sinister than anything of the kind that occurred during the last war. In this war the attack on civil liberties by the Department of Justice has been made in the name of such terms as democracy, liberalism, freedom and the war against Fascism. In the last war, it was made in the name of national defense, public safety and the Constitution. This time there has been more hypocrisy and intellectual dishonesty in the manipulation of the moral symbols to rationalize attempts at suppression of freedom of speech and opinion.

Sixth, Biddle has seemed to prefer the Smith Act of 1940 to the Espionage Act of 1917. Possibly the reason is that the Espionage Act required the showing of an overt act by the alleged conspirator in a conspiracy charge whereas the Smith Act expressly omits that requirement, so essential to safeguarding the rights of the accused.

The authors of this book submit that Biddle's record in respect of Civil Liberties has been established by the Supreme Court's five reversals of judgments he secured. Each reversal was on the ground of insufficient evidence, the ground of the indictment this book formulates against him on account of the Sedition Trial.

CHAPTER VI.

DRAWING AN INDICTMENT.

Ordinarily a good indictment is merely a matter of fitting a criminal charge to a law and to evidence of its violation. If the law fits the acts or if the acts fit the law—two ways of saying the same thing—there is nothing to drawing a good indictment. But if the government wants to prosecute people for acts or utterances which violate no law, the government is up against the sort of task that kept the Washington courts cluttered up with the Sedition Trial from the presentation of evidence to the first grand jury in July, 1941, twelve months before the bringing of the first indictment on July 24, 1942 to the date of the writing of this book, some four years later. Three grand juries spent, in all, over a year hearing evidence. Three indictments were brought. Trial on the third lasted seven and a half months and ended in a mistrial due to the judge's death. Preliminary arguments in court over the three different indictments, and over collateral issues, took up several months of court time.

Scores of young men of military age in the pink of physical condition in the Department of Justice and in the F.B.I. were thus kept on "essential" and safe civilian employment working up this dramatic production for the Washington courts. While this four year experiment was being played with by the Department of Justice and the F.B.I., not only were scores of able-bodied young men thus being kept out of military service or useful civilian war work, but some two score indictees were being subjected to great humiliation, hardship, expense and deprivation of the opportunity of making their contribution to the war effort. These indictees over a period of nearly four years were being forced periodically to repair from all over the United States to Washington for protracted sojourns. There were twenty-eight indictees in the first indictment; and thirty-four in the second indictment. Of these, twelve were dropped from the third indictment and eight new names were added, thus making a cast of thirty for the third indictment and the Trial. Neither of the first two indictments was dropped against any of the indictees, though Rogge did announce that the Department of Justice had no intention of proceeding with either of the first two indictments.

The two-year-long preliminaries of the Sedition Trial were somewhat like those of a big movie production in which there are numerous changes in the script and the cast of actors, the script in this case being the indictment and the actors being the indictees. Only Hollywood probably never wasted so much time and money producing so colossal a flop. Why this experiment had to turn out a farce and a failure could have been fully determined at any time from the beginning to the end of the affair by a brief examination of the law, the general nature of the evidence and the general theory of the prosecution. It does not take four years to prepare and try a case if there is a case. And it should not take years for anyone, including the United States Government, to find out that there is no case when there is none. The government's problem throughout in connection with the three indictments and a seven and a half months' farcical trial on the third indictment was that of trying to make an impossible misfit fit.

The first indictment was brought on July 24, 1942 by a grand jury in the District of Columbia which had been sitting for one year. Because of a District of Columbia law limiting the period within which a grand jury can function, and for other reasons, the first indictment was supplemented by a second indictment against most of the same people, brought some six months later on January 4, 1943 by a second grand jury. The first indictment charged violations both of the sedition and the conspiracy sections of the Espionage Act of 1917, in force only in wartime, and of the sedition section and the conspiracy section of the Smith Act of June 28, 1940.

The weaknesses of these first two indictments were that they fitted neither the law nor the evidence. The government's difficulty was that, to please the people behind the Trial, it had had to indict persons whose only crime was isolationism, anti-Semitism and anti-communism when there was no law on the statute books against these isms. The two laws chosen for the first two indictments penalized advocacy of the overthrow of the government by force and of insubordination in the armed forces.

An indictment charging a violation of either of the above two provisions of both the Espionage Act and the Smith Act would have been easy to draft and to sustain if there had been any evidence of intent or commission. But it was not easy to fit laws against advocating the overthrow of the government by force or insubordination in the army to what the defendants had said, written and done. The big problem for the government was that of how to prove criminal intent to overthrow the government by force and violence or to cause insubordination.

This principle is well stated by the United States Court of Appeals in affirming the conviction under the same law used in the Sedition Trial indictment in the case of *Dunne v. U.S.* 138 F (2) 137, 142, where the court said:

> Intent is the cardinal characteristic and vehicle which is necessary to carry any and all interdicted expressions across the boundary line into crime. This is merely an instance of usual criminal law which protects society from evil doers when they do acts—otherwise innocent—with intent to harm. Thus a man may even kill another and he may be entirely unblamed or he may be executed, dependent solely upon the intent motivating the act.

Killing a man may be murder or a perfectly lawful act. For committing this act in war, the killer may get a Congressional Medal. For committing it as a state executioner, he may get a lawful fee. For committing it under other circumstances he may get the chair. It all depends, not on the act or the instrument with which it is committed, but upon the intent. The commission of an act or the utterance of an idea or sentiment can never be criminal in itself without evidence of a criminal intent. This is why the prosecution formula of trying to prove guilt by similarity of propaganda themes or propaganda content was so fallacious and contrary to due process of law. To link different people by their acts or words in a criminal conspiracy, it is necessary first and foremost to link them in criminal intent. This can never be done by showing the similarity of their political or other opinions. It can only be done by showing similarity of intent.

It boils down to this: to convict its assortment of defendants, the government had to link them in criminal intent to cause insubordination in the armed forces. To do this it had to prove the existence of the particular conspiracy it chose to allege and it had to prove that the defendants joined and furthered that conspiracy—not merely to prove that they said and did a lot of things against which, especially in wartime, there might be strong prejudice. In other words, the government had to pick a single criminal purpose for these defendants and then to link them all with each other around this common criminal purpose or criminal intent. Since anti-Semitism, isolationism, or anti-communism could not be shown to be a criminal purpose or to prove a criminal purpose; since the defendants were not members of any one party, society, organization or group which could be proved criminal in purpose; and since the link between the defendants was only certain similarities in some of their ideas, such as the idea America should have kept out of the war, the government had an impossible task.

As we have seen, the first indictment was brought July 24, 1942, the second, January 4, 1943 and the third, January 4, 1944. William Power Maloney, as a special assistant to the Attorney General, conducted the experiment through the preliminary arguments over the second indictment. By the spring of 1943, when these arguments were wasting the time of a Washington district court and a score of defense attorneys, the problem of the government was how to serve the purposes and the people described in Chapters II and III.

Unexpectedly, on February 7, 1943 Attorney General Biddle appointed O. John Rogge as special assistant in charge of the Sedition Trial project, and kicked Maloney upstairs into an assistant attorney generalship. To understand why this new personality was injected into the case, it will be helpful to keep in mind that the government's big unsolved problem was that of drafting an indictment that would stand up through the preliminary hearings on its sufficiency and thus make it possible for the trial to get under way. The Dunne case will throw considerable light on this problem.

At the time the Department of Justice had its Sedition

Trial experiment at Washington in the preliminaries of argument over the second indictment, it had also in the works another and closely similar show on the boards out at Minneapolis. This was the Dunne case in which twenty-nine persons had been indicted on two counts. One died during the trial just as one of the thirty in the Washington trial died during that marathon event. Five had directed verdicts of acquittal. Five were acquitted by the jury and the remaining eighteen were acquitted on the first count and convicted on the second count. The second count charged conspiracy under paragraph 11 of the Smith Act of June 28, 1940 to violate section 9 against causing insubordination in the armed forces. This was the same as the charge in the Sedition Trial.

Briefly, the only important difference between the indictment in the Dunne case, that of the Minneapolis teamsters who were members of the Trotzkyite Socialist Workers Party, and the Washington defendants in the Sedition Trial, who were not members of any one party or organization, is this: the Minneapolis defendants were charged with conspiring both to overthrow the government by force and to cause insubordination in the armed forces, while the Washington defendants were charged only with conspiring to cause insubordination. There were, of course, great differences between the prosecution theory and the evidence in the two cases, as we shall now see.

Of paramount importance is the following difference between the evidence in the two cases: In the Dunne case, the government submitted evidence of the advocacy by the defendants both of violent overthrow of the government and of military insubordination, while in the Sedition Trial the government neither promised nor did it submit any evidence of advocacy of insubordination. We ask the reader to note well that we do not here express an opinion as to the quality of the evidence in the Dunne case or in the Sedition Trial. We do not say that the evidence in the Dunne case was sufficient. The Circuit Court of Appeals held in that case that the act was valid and that both the indictment and the evidence were sufficient. And the United States Supreme Court refused to review the case.

We repeat, we do not say that the evidence in the Dunne case was sufficient. We merely say that, in the Dunne case, there was evidence to support the charge, whereas, in the Sedition case, there was literally none. We do not say merely that the evidence in the Sedition Trial was insufficient; we go further and say that there was no evidence of any kind or quality whatsoever to support the specific charge of conspiracy to cause insubordination in the armed forces. There was plenty of evidence in the Sedition Trial, but it had nothing to do with counseling, advising, urging or causing insubordination in the armed forces.

To make the last statement entirely clear, we quote the following from the opinion of the Court of Appeals sustaining the convictions in the Dunne case:

> Advocacy of Violence and Insubordination
>
> The record here contains substantial evidence of the purpose to create insubordination in the armed forces by propaganda therein. Some of the evidence to this effect is found at the pages of the record following. . . ."

And here the Court of Appeals lists no fewer than thirty-five different citations from the trial record, each of which tends to show directly specific intent to cause insubordination in the armed forces. Each of these thirty-five pieces of evidence related to the armed forces.

Now in the seven and a half months of the Sedition Trial, there was not one piece of such evidence submitted or even promised. In lieu of such evidence, the prosecutor offered to show that the propaganda of the defendants reached the armed forces in one or two instances and that it was intended and calculated throughout to impair their loyalty to what Rogge called our democratic institutions. Several government witnesses placed members of the armed forces in contact with members of the German-American Bund in its club house at Los Angeles. Many Bund members went into the armed forces. But each witness had to admit, on cross examination, that he knew of no attempt by any Bund member to cause insubordination among the members of the armed forces. Rogge's theory, of course, was that if the Bund sought members among the armed forces it was thereby seeking to cause insubordination. The Supreme Court knocked that theory into a cocked hat a year later by its reversal of the convictions of the twenty-four Bundists in a decision stating that the trial record was bare of any evidence of illegal activities by the Bund.

Rogge also tried to save his case by insisting that advocacy of mutiny and insubordination was not necessarily or exclusively the crime charged. He said that the government had only to show that the propaganda of the defendants preached disloyalty to our democratic institutions. In the later part of the Trial he argued that it was for the jury to infer from any evidence the government chose to offer that such evidence supported the charge. At first, he did not object to defense counsel asking each government witness whether he could testify to any act or utterance by any defendant counseling, advising, urging or causing insubordination. As every witness of the government so questioned had to answer in an emphatic negative, Rogge decided to object to all such questions and the judge, of course, sustained the objection, though it seemed as proper a question in the given case as a defense lawyer could ask a government witness. Rogge argued that it was for the jury to decide and not for the witness who had known, observed and talked with a defendant, to say, whether the defendant had caused or tried to cause insubordination. These questions of defense lawyers to which Rogge objected did not call for a conclusion of the witness but only for a yes or no answer to questions such as "Did you ever hear the defendant say anything about insubordination in the armed forces?"

Rogge would lead his witnesses through long-winded and totally irrelevant testimony about the expressions of opinion of the defendants about the Jews, the communists and American entry into the war. But the moment a defense lawyer tried to ascertain whether the witness could testify to any act or utterance showing intent to cause insubordination in the armed forces, Rogge was on his feet with an objection which the judge always sustained. Such objections clearly revealed to the jury the nature of the government case. The government was out to prove that the defendants were anti-Semites, anti-communists and isolationists. It did not propose to have its case messed up by cross examination about counseling or urging insubordination in the armed forces, the crime the defendants were charged with conspiring to commit. Rogge's theory was that if he could persuade the jury that talking against the Jews constituted an attempt to cause insubordination in the armed forces, he was entitled to convictions. This theory explains his indictment.

In the Dunne case the point we are now thrashing out was fully and clearly elucidated in the opinion of the Court of Appeals overruling the argument of defense attorneys against the validity of the Smith Act and the sufficiency of the indictment on the ground that both, if upheld, would make it dangerous for any one to criticize violently the government or advocate radical political and social changes. The court there said (*Dunne* v. *U.S.* 138 F (2) 147):

> But the act is not intended to prevent changes in our Government but to prevent such changes being brought about in a particular manner—by violence. The Constitution expressly recognizes that changes might be desired by the people in the form and substance of the government when it prescribes and it defines a clear, workable, orderly method for making any changes the people might desire. An individual or organization may advocate any changes whatsoever in the present government—no matter how drastic or how complete—so long as the changes are to be brought about in the orderly manner provided. It is only when the change is to be brought about by violence that the Act reaches out its restraining hand. Therefore, the question here is not the fact of change advocated by appellants but whether they propose to accomplish those changes by violence.

Rogge spent most of his time in his opening statement, as the reader will have occasion to see further on, trying to shock the jury with the tale of the terrible changes the defendants were conspiring to bring about. His evidence for over six months of trial consisted mainly of material tending to fulfill the promise made in his opening but not to support the criminal charge. There was properly before the trial court no issue of fact as to what social or political changes the defendants wanted to bring about. The only issue was, as the Court of Appeals in the Dunne case made clear, whether the defendants were conspiring to bring about changes in an unlawful way, in this instance by causing the armed forces to mutiny.

In the Dunne case the court, in sustaining the convictions, held that the law and the indictment were not incompatible with freedom to advocate any political philosophy or program, including those of communism or socialism, provided such advocacy did not include the overthrow of the government by force or insubordination in the armed forces. The court further said that civil liberties and free speech were safeguarded in the enforcement of the Smith Act by reason of the necessity for the courts to adhere to a strict construction of the terms defining the crimes charged: violence and military insubordination. That dictum completely ruled out the prosecution theory and case in the Sedition Trial. The crime, according to the Dunne case decision, could not be that of undermining the loyalty or faith of any one in our present institutions, as Rogge in the Sedition Trial continuously argued.

Persuading soldiers or anyone else that there should be any sort of change in our form of government, in our institutions or in the governmental personnel could not constitute the offense of either violent overthrow of the government or counseling or causing insubordination in the the armed forces if it were contemplated and advocated that such change be brought about constitutionally. Not one piece of evidence offered or promised purported to show intent to cause a change by violence or a revolt of the army. Whereas, in the Dunne case, much evidence was offered that tended to prove just that sort of intent.

In the Dunne case the court further held that "under the statute making it a crime to advise or in any manner cause insubordination by any member of the armed forces, the words used must be capable of bringing about the forbidden result to constitute the crime." The forbidden result, of course, is not a change in our form of government or the substitution of one set of political principles for another. The forbidden result is exactly defined by the law and the indictment in the following precise terms: "insubordination, disloyalty, mutiny and refusal of duty by members of the military and naval forces of the United States." In the Dunne case the court went to great pains to make it clear that the enforcement of this law should not curb freedom to advocate any amount of change or any kind of change, including a change to communism or

Nazism, provided it was unaccompanied by violence and military revolt. Rogge's opening statement and argument throughout the trial contradicted this view of the Smith Act laid down by the court in the Dunne case.

Coming back to the Sedition case, as it stood at the end of the arguments over the second indictment in the spring of 1943, we may say that in the Dunne case the government had the answer to every practical question as to the whether and the how in the project Rogge was in charge of. Having read the opinion in the Dunne case and having in mind all the facts of the case, the Attorney General should have advised the President about as follows some time after the arguments over the second indictment:

> "Mr. President, I understand how insistent certain groups are that the Sedition Trial be put on against certain so-called native Fascists, anti-Semites and isolationists. I can appreciate how valuable the votes and support of these groups are to the Administration. Nor am I unmindful of the war angle to this case. We are supposed to be fighting Fascism abroad, so why not fight native Fascism in the courts at home? But, on the basis of the Department's experience with the Dunne case, in which we got convictions under the same law we must use on the native 'Fascists' and in the light of what the Department of Justice knows to be the facts about these native 'Fascists,' I must advise you, Mr. President, about as follows: It was easy for us to get convictions in the Dunne case because we had facts to fit the law. All the defendants belonged to one party. That party could be easily shown by its own literature and by the utterances of its leaders to have among its purposes the overthrow of the government by force and violence and the causing of insubordination in the armed forces. It was, therefore, easy for us to prove a case as to intent against the responsible leaders of that party to meet the requirements for a conviction under the Smith Act.
>
> "But, Mr. President, as for these so-called native 'Fascists' and anti-Semites, whom certain of your supporters want us to lock up, the facts are different. They are not united or agreed among each other. Some of them have doubtless exchanged views, literature and correspondence with each other in a limited way. But

> each one has his own little group, organization or publication, which is distinctive and highly individualistic.
>
> "No, Sir, we can't possibly tie these people together by means of a common organization or party. Furthermore, search as we may, we cannot find, either in the literature or records of these native Americans or, even, in those of the Nazis, anything to support a charge that either these Americans or the Nazis ever conspired to cause insubordination in the armed forces or to overthrow the government by force and violence. As you doubtless know, Mr. President, that is not the way Hitler and the Nazis came to power in Germany. The simple fact, Mr. President, is that we have no laws with which to get at these people, because we have no laws against anti-Semitism, racism, Fascism, isolationism or even communism. The laws we have against certain types of propaganda and agitation may fit certain communist propaganda and activities in the past though probably not at present, but they do not fit the propaganda or activities of the so-called Fascists, native or foreign.
>
> "So, Mr. President, I would suggest that you tell the leaders of these minority groups pressing for this trial that we have neither law nor facts with which to oblige them. The facts they keep calling to your attention as grounds for a prosecution do not fit any laws we have. Let them get a law passed to make anti-Semitic expressions a crime, and we can then satisfy their demand for action. But, in the present state of the law, we simply cannot oblige them."

Instead of thus advising the President in the spring or summer of 1943, as the second indictment lay dormant and the Sedition case was entering its third year of experimentation, the Attorney General may be supposed to have advised his chief somewhat as follows:

> "On this Sedition Trial project, Mr. President, we are encountering serious technical difficulties, which, however, we hope, in time and with good luck, to be able to overcome. The case of these native 'Fascists' and anti-Semites is not as simple as that of the Minneapolis C.I.O. teamsters whom your good friend and political henchman, Dan Tobin of the A.F.L., wanted us to do a job on,

which we did. Those Minneapolis chaps all belonged to a Trotzkyite outfit called the Socialist Workers Party which had obligingly given us a perfect case under the Smith Act. These native 'Fascists' and even the German-American Bundists simply never advocated violence or military insubordination as did the orthodox communists. But, don't worry, Mr. President, we are working on the case. And where there's a will, there's a way.

"We have scores of F.B.I. agents all over the United States trying to get something on these native 'Fascists.' We have been endeavoring to discover financial links between them and the Nazi agents formerly in this country. So far, we have hardly uncovered grounds for suspicion. But our F.B.I. agents are going from house to house ringing door bells and asking for anything the neighbors of these native 'Fascists' can tell or suggest about possible links between them and the Nazis. So, even if we don't get anything of this nature on these native 'Fascists,' we succeed in discrediting them among their neighbors by asking everybody to tell us something to link them with the Nazis. Yes, sir, the F.B.I. agents are doing a grand job on these native 'Fascists' by spreading the story that they got German money. They do it just by asking people whether they know anything to support this story. It's a wonderful technique for politics, Mr. President, one the F.B.I. can apply on any group or personality that may prove troublesome.

"Most important of all, Mr. President, we have an excellent man in charge of this project. O. John Rogge is one of the slickest legal technicians for this sort of thing I know of anywhere in the country. He made the Law Review at Harvard, you know. Since then he has made quite a name for himself. He did a swell job down in Louisiana getting members of the Huey Long machine on a highly technical prosecution. He is now drawing down $20,000 a year as counsel for a receivership of Associated Gas and Electric, a choice plum that has fallen to the New Deal in the utility field. Incidentally, it is quite remarkable, Mr. President, how our bright boys come to the government right out of law school, spend a few years here in the New Deal, and then step into big paying jobs and receiverships in Wall Street

> and throughout the country. Washington has become a young man's stepping stone to professional success in the law.
>
> "Well, getting back to the Sedition case, I want you to rest assured, Mr. President, that it is only a matter of time and patience, of which we have plenty. If any one can put over this job, it is Rogge. He has imagination and great enthusiasm for this particular project. He is very close to the people who want the Trial. They expect big things of him. And he has every reason not to disappoint them. This is his big chance. It's a tough assignment, but he is a good man."

That the second hypothetical conversation between President Roosevelt and Attorney General Biddle may not be so far out, can be inferred from the column of Drew Pearson of March 26, 1942, in which he said:

> "After three months of temporizing with native Fascist champions, Attorney General Francis Biddle is finally going to get tough on direct personal orders of the President."

During his contempt trial, one of the interruptions of the Sedition Trial, defense Attorney James J. Laughlin subpoenaed Drew Pearson to confirm several stories about the special interest of President Roosevelt in the Sedition Trial and its relation to the selection of Judge Eicher as a staunch New Dealer to engineer this Presidential project to the desired conclusion. Among the grounds for the contempt action against Laughlin had been the allegations in his petition for Judge Eicher's impeachment, because of bias and prejudice, based on Drew Pearson's statements about the President's intervention in the case and Pearson's statement that Eicher had been specially picked to do this job.

Drew Pearson took the stand and was sworn to testify when Assistant Prosecutor Burns, representing Judge Eicher in the contempt proceeding, rather than allow Laughlin to bring out the facts from Pearson about the President's intervention in the Sedition Trial, quickly interposed with the statement: "We do not question the reliability of Mr. Pearson's sources of information."

CHAPTER VII.

THE THIRD INDICTMENT.

Special prosecutor Rogge, who had taken over the Sedition Trial project in the second indictment phase, must have understood after the arguments over that indictment in the spring of 1943 and in the light of the Dunne case that his big task was to link the defendants with the Nazis in a criminal conspiracy, as he could not link them in any conspiracy with each other. To link them in a conspiracy with each other, he would need some facts. To link them with the Nazis, he thought, he would need only historical assumptions which would not be questioned and the Lasswell method of propaganda analysis to show parallelism which also would not be questioned. If he could link them with the Nazis he would, thereby, link them with each other. If you can't prove thirty people conspired with each other, charge them with belonging to a world-wide movement of ideas. That was too big to need proof.

His defendants were not members of any one organization, party or even group. They were extreme individualists, each plugging away along his own peculiar line. But certain similarities between these propaganda lines could not possibly sustain a charge of conspiracy. For a conspiracy, the purpose or intent must be the same. It is not enough that acts or words of different defendants be similar or even identical. As we have already explained, a bootlegger and a sincere temperance fanatic may support and cooperate in a prohibition crusade, both saying and doing the same things and with the same objective, namely, the enactment of a prohibition amendment, yet with diametrically opposite motives: one wants to revive the profits of increased illicit drinking; the other wants to promote abstinence. The similarity or identical sameness of words and acts by the bootlegger and the anti-saloon leaguer cannot possibly prove a conspiracy between them. To have a conspiracy, there must be sameness of evil motive, intent or purpose, either to achieve an unlawful end through lawful means or a lawful end through unlawful means.

To link his defendants with the Nazis, Rogge conceived the brilliant idea of linking them, not with the Nazi party, which would have been impossible, but with a Nazi world movement of his own conception or assumption. This concept or assumption—it was both—was the key to his indictment and case. He doubtless decided before he started on the third Sedition Trial grand jury October 26, 1943, just after the Dunne case decisions had been upheld in the United States Court of Appeals, that he had to link the defendants with a Nazi movement in order to convict them of the conspiracy he had to charge in order to bring his case under a law, having no evidence that any of the defendants committed any substantive offense. He took it for granted that the existence of any criminal conspiracy or movement he might choose to attribute to the Nazis would not be challenged by the defense. This would leave him only the task of persuading a wartime jury that the defendants had joined that Nazi conspiracy or movement. To make this task easy, he would use the word "movement," as a synonym for the conspiracy he needed to prove. Then the jury would reason that if the defendants joined this "movement," they thereby joined the criminal conspiracy to cause insubordination in the armed forces alleged. To prove the defendants joined a party, some evidence of joining might be thought necessary by the judge and jury. But to prove they formed part of a movement, the prosecutor doubtless thought he could use definition for proof. That is to say, he would define his movement so as to include them. Thus he would not need to prove they joined it. He would only have to put across with the jury his definition of his alleged movement. This was legal creative genius working in the stratosphere.

A key passage in the indictment, which we give in full at the end of this chapter, is:

> The persons hereinafter named as defendants joined in this movement and program and actively cooperated with each other and with leaders and members of the said Nazi Party to accomplish the objectives of said Nazi Party in the United States.

The above is from the preamble. The next key quotation we give here is from the more fundamental charging paragraph in the one count of the indictment, in which there is a key reference back to the "movement" concept so clearly stated in the preamble sentence above quoted:

> On the 28th day of June, 1940, there were enacted Sections 1 and 3 of the Act of June 28, 1940, Title I, 54 Stat. 670-671 (18 U.S.C. 9, 11), and continuously thereafter up to and including the date of the filing of this indictment, *in continuance of their aforesaid movement and program*, * * *

Here follows the usual recitation in an indictment of the names of the defendants and what they are charged with having done in violation of the law. The point is that the charge as well as the preamble allege that the criminal conspiracy charged to fit the law was a part, and in furtherance, of the "movement and program" of the Nazis, which Rogge assumed he would not have to prove.

We ask our readers to note carefully the method. In substance it amounted to saying: "We shall prove *A* by proving *B* and by proving that *B* equals *A*. We cannot prove *A* by itself. But we can take *B* for granted. And we can make out a circumstantial evidence case that *B* equals *A; A* and *B* look so much alike." Translated, this means: "We shall go about proving that the defendants conspired to cause insubordination among the armed forces by asserting and assuming without need for proof that the Nazis conspired to do this (that is *B*); and we shall prove by similarities of propaganda themes that the defendants were part of a Nazi world movement, one purpose of which, as already assumed in our premise, was to do this (this is saying that *B* equals *A*). We cannot prove that the defendants conspired to cause insubordination as a separate proposition. And we do not need to prove that the Nazis did. We assume no defense will challenge anything bad we say against the Nazis. This leaves us with only one proposition to prove, namely, that the defendants talked like the Nazis. This we shall do by selecting thousands of things the Nazis and the defendants said that were similar and presenting them to the jury. We'll just define these defendants into the the Nazi world movement."

Before turning the indictment over to the reader, we offer for consideration in the reading of the indictment, the dictionary definitions of the term "movement" as

Rogge and the indictment used it, together with a few comments:

Webster's International Dictionary, 2nd Edition, unabridged (1943) defines "movement" as,

> 4. A concerted and long continued series of acts and events tending toward some more or less definite end; an agitation in favor of some principle, policy, etc., as, the Tractarian movement; the prohibition movement.
> 5. An effect as of motion; hence in literature and other art, action; incident; as a poem of dramatic movement.
> 6. pl. Activities of a person or group of persons.
> 7. Tendency of change; trend, as the movement of age.

Now in the dictionary definitions of the term "movement," the only ones that fit Rogge's use of the term are to be found in 4, 6 and 7 and possibly though doubtfully in 5. 4 and 7 are the only definitions or senses in which the term "movement" corresponds exactly to the uses Rogge made of the term in the indictment and in argument. Rogge was talking about a concerted and long continued series of acts and events tending toward some more or less definite end; an agitation in favor of some principle, policy etc., or he was talking about a tendency of change or a trend. In any case, these definitions cannot be considered, by any stretch of the imagination, as the equivalents of, or synonyms for, a conspiracy or even a lawful association or confederation of people. The fact that people, all over the world, are moving with a given tendency of change or with a trend, or that they are playing a part, participating, in a series of acts and events tending towards some definite end or in agitation in favor of some principle or policy, in no way supports a charge that they are confederated, united, agreed or conspiring together. Thus, everybody in the prohibition movement was not in agreement or confederation with everybody else in that movement. The word "movement" is not a synonym for a party or an organization. A party or organization is more than a movement. It is something more concrete and more organic.

While it was doubtless absurd to say that the defendants were in the same Nazi world movement, their defense could safely have conceded for the sake of argument that they were—exactly as it might be said that President Truman, Prime Minister Churchill and Prime Minister Attlee and Marshal Stalin were all in a single movement which could be called the internationalist, the democratic, the collectivist or the peace movement—and then the defense could have argued with irrefutable logic that this concession in no way supported or helped the government's case on the charge of conspiracy to cause insubordination. It would have been fair to have said a few years ago that Roosevelt, Stalin and Hitler were all leaders in a world movement towards a planned economy. At the moment of writing, there could be nothing wrong about saying that Truman, Stalin and Atlee were in the same movement. Yet it would be ridiculous to suggest that they had the same political or social program or were agreed as to political and economic doctrines.

If Rogge could have shown that it was a characteristic of the Nazis to try to cause mutiny and insubordination in the armed forces and that the defendants were collaborating with the Nazis in this part of the Nazi program, Rogge would have had a case on his prosecution theory. But he could not show that it was a characteristic and publicly announced feature of Nazism to try to cause insubordination in the armed forces. But even had the Nazis and the defendants been engaged in efforts to subvert the loyalty of the armed forces, that would not necessarily have proved them in the same conspiracy, though it would have sufficed to convict the defendants without dragging in the Nazis. All persons all over the world committing the same crime or conspiring to commit it are not necessarily all conspiring with each other.

The facts are that Rogge could not possibly show that causing insubordination was a feature of Nazism or a practice of any defendants. He merely asserted that it was a feature of Nazism and that the defendants were like the Nazis because both were anti-Semitic, hence the defendants were part of a Nazi world movement to cause insubordination in the armed forces.

The point we have been laboring above has been conclusively stated by the United States Supreme Court in the Bridge's case in the following words:

> Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited

> objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become "affiliated" with the Communist cause because these men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated, the act or acts tending to prove "affiliation" must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities.

In the Bridges' case (*Bridges* v. *Wixon*, 89 Lawyers Edition No. 17, page 1489) reversal was made on the simple ground of a misconstruction of the single word "affiliation" by the Attorney General and a lack of evidence. In the Sedition Trial a whole series of misconstructions of terms like "movement," Fascism and National Socialism, and of the express language of the statute, combined with a lack of relevant evidence to support the charge of the indictment, made a valid conviction impossible as well as rendered the trial a farce.

Before or after reading the indictment in the Sedition Trial, the reader would be aided to an understanding of its incurable defects if he studied carefully the extremely long indictment of the twenty-four Nazi major war criminals before the International Military Tribunal. This latter indictment, of course, could not be tried under American or British rules or principles. Under Anglo-Saxon rules an indictment must fit both the terms of some penal statute or statutes and the evidence in the case. In the war crimes trial, the law is the charter for the International Military Tribunal, which law was drafted to fit both the evidence and the purposes and theory of the prosecution. In the Sedition Trial Prosecutor Rogge labored under the handicap of not having had a special law passed to fit his prosecution theory and evidence. He was further handicapped by the fact that instead of having to try his charge before a tribunal picked for the purpose of convicting the accused, he had to try it before a normal jury. Jurisprudence in America is still operating under the old norms of no crime without a law, no ex post facto law, and no one shall be the judge of his own cause. The more advanced (?) jurisprudence of the totalitarian states, now adopted by the United Nations for war crime trials, has scrapped these older principles of justice and equity which have been recognized and observed among civilized peoples since the time of the Romans.

It is not our purpose here to analyze or criticize the war crimes trial indictment or procedure. But, since both that indictment and the indictment in the Sedition Trial allege a Nazi conspiracy, the authors of this book deem it fitting at this point to call the reader's attention to a few points about the two indictments with a view to illustrating the fatal defects of the Sedition Trial indictment.

1. Both indictments allege a Nazi conspiracy and common plan but are mutually contradictory as to the nature of that conspiracy or plan, the war crimes indictment conspiracy corresponding more nearly to the historical record.

2. The war crimes indictment, unlike the Sedition Trial indictment, does not charge or allege that the Nazis conspired to overthrow democracy throughout the world, to replace it with National Socialism and Fascism, or to cause insubordination among the armed forces anywhere as a means to the ends just stated.

3. The war crimes indictment charges the Nazi conspiracy with three major "aims and purposes" no one of which figures in the Sedition Trial indictment and no one of which includes the "aims and purposes" charged in the latter indictment to the Nazi conspiracy it alleges and charges the defendants with having joined. Here we quote from the war crimes indictment on the purposes of the Nazi conspiracy:

> (B) Common objectives and methods of conspiracy.
>
> The aims and purposes of the Nazi party and of the defendants and divers other persons from time to time associated as leaders, members, supporters or adherents of the Nazi party (hereinafter called collectively the "Nazi conspirators"), were, or came to be, to accomplish the following by any means deemed opportune, including unlawful means, and contemplating ultimate resort to threat of force, force and aggressive war:
>
> (1) To abrogate and overthrow the Treaty of Ver-

> sailles and its restrictions upon the military armament and activity of Germany;
>
> (2) To acquire the territories lost by Germany as the result of the World War of 1914-1918 and other territories in Europe asserted by the Nazi conspirators to be occupied principally by so-called "racial Germans";
>
> (3) To acquire still further territories in Continental Europe and elsewhere claimed by the Nazi conspirators to be required by the "racial Germans" as *"Lebensraum,"* or living space, all at the expense of neighboring and other countries. The aims and purposes of the Nazi conspirators were not fixed or static but evolved and expanded as they acquired progressively greater power and became able to make more effective application of threats of force and threats of aggressive war.
>
> When their expanding aims and purposes became finally so great as to provoke such strength of resistance as could be overthrown only by armed force and aggressive war, and not simply by the opportunistic methods theretofore used, such as fraud, deceit, threats, intimidation, fifth-column activities and propaganda, the Nazi conspirators deliberately planned, determined upon and launched their aggressive wars and wars in violation of international treaties, agreements and assurances by the phases and steps hereinafter more particularly described.

The above formulation of Nazi conspiratorial aims, the essence of which is German expansion, does not agree with the formulation in the Sedition Trial indictment, according to which the Nazi conspiracy was a movement, world-wide in scope and membership, to overthrow democracy everywhere and replace it with National Socialism, one of the criminal means being incitement to insubordination in the armed forces.

4. Of even greater importance is the fact that the war crimes indictment charges each of the defendants with conspiracy by virtue of membership in the Nazi party, whereas in the Sedition Trial indictment the government charges and proposes to prove only that the defendants joined and furthered "a movement and program" one of the purposes and means of which was causing insubordination in the armed forces. Now there is a big difference between mem-

bership in the Nazi party and participation in an alleged Nazi world movement. To clear up this difference it will be helpful to keep in mind the following from the war crimes indictment:

> IV. Particulars of the nature and development of the common plan or conspiracy.
>
> (A) Nazi party as the central core of the common plan or conspiracy.
>
> In 1921 Adolf Hitler became the supreme leader or *Fuehrer* of the *Nationalsozialistische Deutsche Arbeiterpartei* (National Socialist German Workers party, also known as the Nazi party), which had been founded in Germany in 1920. He continued as such through the period covered by this indictment.
>
> The Nazi party, together with certain of its subsidiary organizations, became the instrument of cohesion among the defendants and their co-conspirators and an instrument for the carrying out of the aims and purposes of their conspiracy. Each defendant became a member of the Nazi party and of the conspiracy with knowledge of their aims and purposes, or with such knowledge, became an accessory to their aims and purposes at some stage of the development of the conspiracy.

5. In the Sedition Trial there was neither American law nor evidence as to the defendants to fit a criminal charge of membership in the Nazi party. The Nazi party was, according to the allegations in the war crimes indictment and according to the general consensus of historians and authorities, a German movement devoted to the three common objectives of German liberation from the Versailles Treaty and German reacquisition of lost territory plus German expansion alleged in the war crimes indictment. The Nazi movement which the defendants in the Sedition Trial were charged with having joined and thereby entered a conspiracy to cause insubordination in the armed forces was something entirely different, something universal, something world-wide, something anybody except Jews and communists could have belonged to, something that was largely a creation of the imagination, a thing of definition and assumption.

In resume, Nazism as defined in the war crimes indictment is not Nazism as defined in the Sedition Trial indictment. The two theories of the two indictments are mutually exclusive and utterly irreconcilable. We now turn the latter indictment over to the reader without further introductory comment except to call attention to the unsportsmanlike use of the term "alias" in giving the noms de plume of certain defendants, used by them exclusively as pen names in publication titles: (Mark Twain, one of America's most eminent and beloved authors, used throughout his life a nom de plume, his real name being Samuel Langhorne Clemens. Many Hollywood stars go through life under stage names. How absurd and unfair to call either a pen name or a stage name an alias! It was just another Rogge trick to create prejudice and confusion.)

THE THIRD INDICTMENT

Criminal No. 73086
Violation of Section 11, Title 18,
United States Code.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

District of Columbia, ss: October Term, A.D. 1943.

INDICTMENT

The Additional Grand Jurors for the United States of America, duly empaneled and sworn in the District of Columbia on October 26, 1943, for the October 1943 Term, upon their oaths present that:

In 1933 the National Socialist German Workers Party, also known as the N.S.D.A.P. and the "Nazi Party," came into power in Germany upon a program publicly announced by its leaders to destroy democracy throughout the world and to establish and aid in the establishment of national socialist or fascist forms of government in place of the forms of government then existing in the United States of America and other countries. As a means of accomplishing their objectives, the said Nazi Party and its leaders carried on a systematic campaign of propaganda designed and intended to impair and undermine the loyalty and morale of the military and naval forces of the United States of America and of other countries. The persons hereinafter named as defendants joined in this movement and program and actively cooperated with each other and with leaders and members of the said Nazi Party to accomplish the objectives of said Nazi Party in the United States.

On the 28th day of June, 1940, there were enacted sections 1 and 3 of the Act of June 28, 1940, c 439, Title I, 54 Stat. 670-671 (18 U.S.C. 9, 11), and continuously thereafter up to and including the date of the filing of this indictment, in continuance of their aforesaid movement and program,

JOSEPH E. McWILLIAMS
GEORGE E. DEATHERAGE
WILLIAM DUDLEY PELLEY
JAMES TRUE
EDWARD JAMES SMYTHE
LAWRENCE DENNIS
HOWARD VICTOR BROENSTRUPP, alias
COUNT VICTOR CHEREP-SPIRIDOVICH;
LIEUTENANT-GENERAL CHEREP SPIRIDOVICH;
ROBERT EDWARDS EDMONDSON
E. J. PARKER SAGE
WILLIAM ROBERT LYMAN, JR.
GARLAND L. ALDERMAN
GERALD B. WINROD
ELIZABETH DILLING, alias
REVEREND FRANK WOODRUFF JOHNSON
CHARLES B. HUDSON, alias
REVEREND FRANK WOODRUFF JOHNSON
ELMER J. GARNER
GEORGE SYLVESTER VIERECK, alias
JAMES BURR HAMILTON
PRESCOTT FREESE DENNETT
GERHARD WILHELM KUNZE
AUGUST KLAPPROTT
HERMAN MAX SCHWINN
HANS DIEBEL
FRANZ K. FERENZ
ERNEST FREDERIK ELMHURST
ROBERT NOBLE
ELLIS O. JONES
EUGENE NELSON SANCTUARY

DAVID BAXTER, alias JOHN PEPPER, alias
JOHN H. RAND
LOIS DE LAFAYETTE WASHBURN, alias T.N.T.
FRANK W. CLARK, alias G.P.
PETER STAHRENBERG

hereinafter called the defendants, in the District of Columbia and within the jurisdiction of this court, and at divers other places throughout the United States of America, in Germany, and elsewhere, in violation of Section 3 of the aforesaid Act of June 28, 1940, (18 U.S.C. 11) unlawfully, wilfully, feloniously and knowingly conspired, combined, confederated and agreed together and with each other and with officials of the Government of the German Reich and leaders and members of the said Nazi Party, said persons hereinafter being referred to as "co-conspirators," to commit acts prohibited by Section 1 of said Act (18 U.S.C. 9) in that they, the said defendants and the said co-conspirators, with intent to interfere with, impair and influence the loyalty, morale and discipline of the military and naval forces of the United States, would:

(i) Advise, counsel, urge and cause insubordination, disloyalty, mutiny and refusal of duty by members of the military and naval forces of the United States; and

(ii) Distribute and cause to be distributed written and printed matter, advising, counseling, and urging insubordination, disloyalty, mutiny and refusal of duty by members of the military and naval forces of the United States.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that, as part of said conspiracy and as means and methods of accomplishing the objects thereof, the said defendants and co-conspirators, during the period of said conspiracy, in the District of Columbia and within the jurisdiction of this court and at divers other places throughout the United States, in Germany, and elsewhere would do, and they did, among other things, the following:

1. Print, publish, distribute and circulate, and cause to be printed, published, distributed and circulated, among others, the following newspapers, magazines, books, leaflets,

circulars, pamphlets, documents, cartoons, drawings and photographs:

MEIN KAMPF
THE NATIONAL SOCIALIST PARTY PROGRAMME
WELT DIENST (WORLD SERVICE)
DER STUERMER
NEWS FROM GERMANY
DEUTSCHE WOCHENSCHAU
MUENCHNER NEUSTE NACHRICHTEN
THE FREE AMERICAN AND DEUTSCHER WECKRUF UND BEOBACHTER
THE WHITE KNIGHT
THE AMERICAN NATIONALIST CONFEDERATION NEWS BULLETIN
THE REVEALER
THE DEFENDER
LIBERATION
THE ROLL CALL
THE GALILEAN
NATIONAL LIBERTY PARTY
YANKEE FREEMEN
YANKEE MINUTE MEN
FRIENDS OF PROGRESS
INDUSTRIAL CONTROL REPORTS
SOCIAL REPUBLIC SOCIETY BULLETIN
COMMENT
THE CORPORATE STATE
WHAT PRINCE LIPPE TOLD ME
PATRIOTIC RESEARCH BUREAU NEWS LETTER
EDMONDSON'S ECONOMIC RESEARCH SERVICE
"AMERICAN VIGILANTE" BULLETINS
THE CHRISTIAN MOBILIZER
THE WEEKLY FOREIGN LETTER
THE DYNAMICS OF WAR AND REVOLUTION
PUBLICITY
AMERICA IN DANGER
NATIONALIST NEWSLETTER
OUR COMMON CAUSE
THE WORLD HOAX
ROOSEVELT'S JEWISH ANCESTRY
HISTORY REPEATS
THE ANSWER TO THE BETRAYAL

AMERICA ON THE MARCH
NATIONAL SOCIALISM AND ITS JUSTIFICATION
Card headed "WEST AFRICA IS NOT ICELAND—IT'S ANYTHING BUT A NICE LAND!"
THE MIRACLE OF HAPPINESS

2. Organize, support, use, and control, and cause to be organized, supported, and used, among others, the following parties, offices, groups, organizations, publishers and distributors:

NATIONAL SOCIALIST GERMAN WORKERS PARTY (N.S.D.A.P.)
FRANZ EHER PUBLISHING HOUSE, MUNICH
FOREIGN ORGANIZATION OF THE NATIONAL SOCIALIST PARTY (A.O.)
MINISTRY OF PUBLIC ENLIGHTENMENT AND PROPAGANDA OF THE GERMAN REICH
GERMAN LIBRARY OF INFORMATION
WELT DIENST, Erfurt (WORLD SERVICE)
GERMAN FOREIGN INSTITUT, Stuttgart (D.A.I.)
LEAGUE OF GERMANDOM ABROAD (V.D.A.)
FICHTE BUND, Hamburg
TERRAMARE OFFICE, Berlin
TRANSOCEAN NEWS SERVICE
FOREIGN OFFICE OF THE GERMAN REICH
GERMAN EMBASSY at Washington, D.C., and various GERMAN CONSULATES in the United States
GERMAN MINISTRY OF EDUCATION
AMERIKA INSTITUT
GERMAN-AMERICAN BUND
SILVER SHIRTS
SILVER LEGION
PELLEY PUBLISHERS
FELLOWSHIP PRESS, INC.
KNIGHTS OF THE WHITE CAMELIA
AMERICAN NATIONALIST CONFEDERATION
NATIONAL LIBERTY PARTY
NATIONAL WORKERS' LEAGUE
FRIENDS OF PROGRESS
PATRIOTIC RESEARCH BUREAU
SOCIAL REPUBLIC SOCIETY, also known as S.O.C.I.S.
JAMES TRUE ASSOCIATES

FLANDERS HALL, INCORPORATED
ARYAN BOOK STORE
THE DEFENDERS PUBLISHERS
THE CHRISTIAN MOBILIZERS
THE AMERICAN DESTINY PARTY
AMERICAN NATIONAL SOCIALIST PARTY
NATIONAL PRESS ASSOCIATION

3. Disseminate, by the means set forth in the preceding two paragraphs and otherwise, oral, written, and printed statements, representations and charges asserting among other things in substance that:

a. Democracy is decadent; a national socialist or fascist form of government should be established in the United States.

b. A national socialist revolution is inevitable if we are to rid our country of its decadent democracy.

c. The Government of the United States, the Congress and public officials are controlled by Communists, International Jews, and plutocrats.

d. The Democratic and Republican parties and their candidates for public office are tools of International Jewry, and do not represent the will of the American people.

e. The acts, proclamations, and orders of the public officials of the United States and the laws of Congress are illegal, corrupt, traitorous and in direct violation of the Constitution of the United States.

f. The United States is governed, not by the duly elected representatives of the people, but by a group of alien-minded persons opposed to American principles and ideals and seeking to overthrow the Constitution of the United States.

g. President Roosevelt is reprehensible, a warmonger, liar, unscrupulous, and a pawn of the Jews, Communists and Plutocrats.

h. President Roosevelt is a Jew and is working with International Jewry against the interests of the people of the United States.

i. The activities and territorial acquisitions and plans of the Axis Powers constitute no real danger to the national existence and security of the United States or any of its territorial possessions.

j. The Axis Powers are fighting to free the world from domination by Communism and International Jewry, and to save Christianity, hence the United States should give no aid and comfort to the enemies of the Axis.

k. The cause of the Axis Powers is the cause of justice and morality; they have committed no aggressive act against any nation and are fighting a solely defensive war against British Imperialism, American Capitalists, and the desire of American public officials to rule the world, hence any act of war against them is unjust and immoral on the part of the United States.

l. The nations opposed to the Axis, plan to use American lives, money and property to defend their decadent systems of government.

m. The participation of the United States in the war has been deliberately planned by our leaders with the ultimate aim of promoting our enslavement by British Imperialism and International Communism.

n. The public officials of the United States of America are trying deliberately to provoke war with peaceful nations, such as Germany, Italy and Japan, which are seeking only to live at peace with the rest of the world.

o. President Roosevelt and Congress, through a surreptitious and illegal war program against the Axis Powers sold out the United States and forced the Axis Power to wage war upon us.

p. President Roosevelt by his war-mongering policies is draining dry the resources of the United States to save Communist China, Imperialist Britain and Atheistic Russia from inevitable defeat.

q. Our program of giving American arms and equipment to foreign nations results in United States military and naval forces being inadequately armed and equipped and in their being exposed to terrible slaughter.

r. The public officials of the United States are knaves who have deliberately concealed the truth that our unprepared boys, racked by disease and slaughtered like sheep, will be dumped in a million foreign graves to buy a valueless victory.

s. The whole war is the result of a Jew-sponsored money-making scheme to bleed the United States Treasury.

t. As the result of incompetence and corruption in public office, the United States is unprepared to wage war against the Axis Powers, who have the best equipped and most powerful military establishment in the world.

u. The present war is a dishonest war waged at the expense and measured in the blood and dollars of the people of the United States solely for the benefit of and to insure the continuance of world domination by "International Bankers," "International Capitalists," "Mongolian Jews," "Communists," and "International Jewry."

v. The Japanese attack upon Pearl Harbor was deliberately invited by the public officials of the United States, in order to involve the United States in a foreign war.

w. The war with Japan was deliberately provoked by the insane, unjust, aggressive and traitorous policies of officials of the United States.

x. An honorable and just peace could be brought about speedily were it not for the opposition of Communists, International Jewry, and war profiteers.

Contrary to the form of the statute in such case made and provided (Section 11, Title 18, United States Code), and against the peace and dignity of the United States.

Edward M. Curran
United States Attorney for the
District of Columbia.
O. John Rogge
Special Assistant to the
Attorney General.

A TRUE BILL:

John W. Francis, Foreman.

In the arguments on demurrers and motions to quash this indictment it was pointed out by defense counsel that paragraph two and the first part of paragraph three of the indictment, referring to the world movement and program, had no part in that instrument. The trial judge thought it surplusage. Rogge, however, earnestly maintained that these parts were what he called "window dressing" and necessary to show intent—he never explained whether he meant the general criminal intent required in the violation of any criminal statute or the specific intent to impair the morale of the armed forces required by the statute in question. So the trial judge overruled the various motions of defense counsel and permitted the term "movement" to remain in the indictment. And thus the case was launched on its farcical course of debating an unprovable historical thesis about a Nazi world "movement," instead of turning on the proof of a conspiracy to cause insubordination in the armed forces of the United States.

CHAPTER VIII.

THE PROSECUTOR'S OPENING STATEMENT.

It will be fairly obvious to any reader of the preceding chapters that the indictment in the Sedition Trial would be neither read in full nor understood by the average juror. Normally, the charge in a criminal trial is fully and clearly understandable. The facts of the given case, of course, only come out during the trial, and, sometimes, they do not emerge clearly even then. But simple criminal charges like murder or embezzlement are understood by the wayfaring man of average intelligence. It is only on this basis that the jury system can function and yield satisfactory results. When criminal charges of such complexity and subtlety are conceived and fitted to relatively simple penal statutes that it is necessary to write a book to explain the nature of one of these charges, the entire system of criminal law administration is being dangerously abused.

In the Sedition Trial the charge of the indictment is something that needs a lot of explaining. Members of the jury were often heard to remark during the course of the Trial to defense lawyers and defendants with whom they mingled while snatching a quick bite in a lunchroom across from the courthouse, that they were still trying to find out what the case was all about.

The prosecutor's opening statement, delivered on May 17, exactly one month after the Trial started, a month having been spent on the selection of a jury, tells everything there is to tell about the prosecution theory, provided one gives this statement the analysis it requires. This calls for a great deal of sustained thinking and a lot of knowledge of the background of the Nazi movement in Germany. Like any tricky and involved piece of legal reasoning and drafting, it was much too clever, subtle and full of unfamiliar subjects to be digested by any one, no matter how intelligent, on one reading or one hearing. The product of nearly two years of work by some of the keenest legal minds in the Department of Justice simply cannot be assimilated in an hour's reading.

The authors of this book believe the prosecutor's statement fully merits the space they are giving it. A prosecution theory of this type marks a break with long established traditions, rules and standards developed in over three centuries of British and American jurisprudence. It marks a trend towards application here in America of the theories and practices of the totalitarian states, in which people are tried, convicted and often sentenced to death for having been on the losing side in a political fight.

The prosecutor's opening statement normally has the function of telling the jury in brief what the government expects its evidence to show. Where this statement is confined to this undertaking, there can be little ground for objection on the part of the defense. But, in the Sedition Trial, the opening statement attempted to expound the government's prosecution theory. So it was more of an argument to the jury than a statement of what the evidence would show. It was more in the nature of a statement of what the government argued the jury should infer from the evidence than of what the evidence would show. Presumably, the evidence in a criminal case shows mainly two things: that certain acts alleged were committed and that these acts were committed with the specific criminal intent charged. We leave it to the reader to decide for himself whether the opening statement which follows, with accompanying comments by the authors, is mainly a promise of evidence to prove the commission of the specific act of conspiring to undermine the loyalty of the armed forces as defined in the first section of the Smith Act and the necessary criminal intent to sustain a conviction under this particular law.

In presenting the prosecutor's opening statement in full as it appears in the official record of the Trial, with insertions of comment by the authors, we omit interruptions by the court and counsel in the course of the delivery of this statement.

Mr. Rogge: Ladies and gentlemen of the jury, in an opening statement, as short as the nature of the case will permit, I want to give you a brief outline of what is involved in order that you may follow the evidence as it is introduced.

The indictment in this case charges the defendants, twenty-nine in number, all of whom you see sitting here in the courtroom, with conspiring with officials of the German Government and leaders of the Nazi Party in Germany to cause insubordination and disloyalty among members of our armed forces.

Comment:

It is to be noted here that the prosecutor does not say, as does the indictment, that the defendants conspired with each other. He says only that they conspired with officials of the German Government and leaders of the Nazi Party in Germany. Thus, in effect, the prosecutor gave the indictment exclusively the character of a charge against the defendants of conspiring with the enemy, with the nation the United States was then at war. For all practical purposes, this charge, thus formulated to the jury, was the equivalent of a charge of treason. A charge of treason, of course, would have set standards of proof for the government which it could not have met as against any of these defendants. The Constitution says: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Mr. Rogge:

A conspiracy of this kind was made illegal and punishable as a crime by an Act of June 28, 1940. The Government charges that the twenty-nine defendants violated that act.

The indictment alleges, and the evidence will show, that at the time of the passage of the Act of June 28, 1940, there was in existence a world-wide Nazi movement which had as its objective the destruction throughout the world of democratic, representative forms of government such as ours. The evidence will show that the defendants joined this world-wide Nazi movement and that they wanted to substitute a Nazi or Fascist form of government in the United States for our present form of government.

Comment:

This much of the prosecution theory is enough to prove that it is not susceptible of proof within the framework of trial by jury. Once the defendants are charged with conspiracy to follow the Nazi pattern of revolution, or to carry it out in this country, among the basic issues of fact in the trial become the following: What was the Nazi pattern of revolution? Could that pattern be followed in this country? If any one is inclined to think that the first question raises no debatable issues of fact, he has not read many of the scores of books written about the Nazi revolution. All historical propositions covering a long period and a large number of actors are debatable. It is easy to prove the occurrence of any single event in the course of the Nazi or any other revolution. It is not possible to prove just what was the Nazi pattern of revolution the defendants were accused of conspiring to follow in America.

If the reader asks, "Why should the defense argue over the history of the Nazi revolution?" the answer may be given in two parts: first, a large part of the defense against this charge must be a showing that it would be impossible in this country to duplicate the Nazi pattern or to use here the same methods used by the Nazis in coming to power in Germany because conditions here are so different from what they were in Germany; second, the historical record, according to most historians and writers, shows that the Nazis did not come to power in Germany by causing insubordination in the German army. Prosecutor Rogge argued that it was in that way the Nazis came to power. That is an opinion or interpretation found in absolutely no book about the Nazi revolution. That, however, was Rogge's thesis. Moreover, Rogge said, in effect: "Here is the Nazi master plan, not only for Germany but for the whole world. This is what these defendants were in a conspiracy to carry out."

Well, if the defendants knew and were agreed about the Nazi plan for the world, the ablest and best-informed writers on the subject certainly were not, as a reading of recent publications will conclusively establish. Thus, for example, Professor William L. Langer, a history professor at Harvard and during the war in charge of special historical work with the United States Army at the War College in Washington, writing in *The Yale Review* of June, 1938, in an article entitled "When German Dreams Come True," pointed out that Hitler's *Mein Kampf* was no reliable or sufficient guide to Hitler's policies, and that much of what Hitler had said and done subsequently to his advent to power in 1933 had been in contradiction with the lines laid down for Nazi policy in *Mein Kampf*. Professor Langer was only emphasizing the obvious when he stressed the fact that Hitler had at no time given the world a full statement of his final objectives. When Hitler made his pact of August 23, 1939 with Stalin he astounded the world and no one more than scholarly students of the history of the Nazi movement.

Another authority on Nazi Germany of great competence, Dr. Peter F. Drucker, who was a secretary to Chancellor Bruening back in the early thirties and who is now teaching in this country, wrote in *Harper's Magazine* of November, 1940, several months after the passage of the Smith Act and over a year after the beginning of the world war, an article entitled "Germany's Plans for Europe" in which he exposed the popular error of supposing that Hitler had a definite plan for the establishment of German control of Europe. Drucker showed that no such plan could be found in current Nazi literature of the period but rather the exact opposite, namely, the sharpest disagreement among the Nazis as to how Nazi-dominated Europe was to be organized and administered.

Here we have a German born authority, a life-long student of current German history and a frequent contributor of articles to American publications like *Harper's* and *The Saturday Evening Post,* telling the world that Hitler's plan for Europe and the world was a matter of uncertainty and a subject of dispute even among the Nazis. (This was back in 1940.) General Marshall's biennial report of September 1, 1945 made the same point. Yet the egregious Rogge would have had an American jury believe that he was going to prove to them not only that the Nazis had a plan but what it was and that all the defendants before them on trial knew that plan and were conspiring with the Nazis and with each other to carry it out in this country. It took a thoroughly Teutonic lack of a sense of humor on the part of both judge and prosecutor to follow Rogge's offer of proof without a broad smile as they looked on the twenty-nine defendants, only four or five of whom had had a college education.

According to Rogge's opening statement, as well as both the indictment and the bill of particulars, there was complete certainty and definiteness about the Nazi plan for America. According to Drew Pearson's column, there had been among the staff of the German Embassy in Washington before Pearl Harbor the sharpest division of opinion as to propaganda policy for the United States. According to Rogge, the Nazis and the defendants were following a publicly announced program. It was a matter of common knowledge and general agreement among the co-conspirators. It constituted a criminal conspiracy in American law by reason of the commitment assumed by all the defendants to use the means of causing insubordination in the American armed forces to the Nazi world-plan end. All the defendants in the Trial were charged with full knowledge of the exact details of the plan and with agreement on and furtherance of the plan. We could multiply indefinitely citations from the highest authorities contradicting every essential proposition of Rogge's thesis. We merely cite a few authorities of unimpeachable competence by way of making the point that Rogge's thesis was not susceptible of proof, being contrary to the consensus of expert opinion. Rogge had a right to his opinion, even though it ran counter to the consensus, but he had no right to be allowed try to prove his opinion about history by way of sustaining a criminal charge in an American court. Historical interpretations are not evidence, even where they happen to agree with the majority of experts. Rogge's disagreed.

Mr. Rogge:

To bring about this Nazi revolution I have mentioned, the defendants intended to and did use the same methods that the Nazis had already successfully used in Germany. They engaged in a systematic propaganda campaign inciting people to hatred of our present form of government and to hatred of certain groups and classes, and they tried to interfere with the loyalty of members of our armed forces to our present form of government.

The evidence will show that the impairment of the loyalty of our armed forces was a vital and integral part of the conspiracy in which the defendant and the Nazis were engaged in order to destroy democracy throughout the world, including the United States, and establish Nazism instead. The evidence will show that the propaganda which the defendants put out was calculated and intended to impair the loyalty of our armed forces by convincing them that our democratic form of government and our institutions were neither worth defending nor fighting for.

Comment:

Here Rogge's language is highly misleading, if not downright wrong as to the law in question. The sense of his statement and the essence of his case, as will appear more fully as we go into it, is that anything said to impair or undermine people's faith in or respect for our present form of government and institutions constitutes the crime of impairing the morale of the armed forces. Precisely because the law, as worded, lends itself to this sort of abusive and absurd misconstruction or loose construction, Professor Chafee in his *Free Speech in the United States* came out so strongly against it. The law in question, the Smith Act of 1940, can be interpreted loosely and applied broadly in a way to suppress free speech by making any attack on our form of government and institutions an attempt to cause insubordination in the armed forces. Obviously, as the ruling of the Court of Appeals in the Dunne cases, already extensively cited, held in respect to a conviction under this law, such an interpretation or construction of the law as Rogge made in the above paragraph is both unreasonable and unconstitutional. The reasonable interpretation of the law in question, the interpretation that has the support of the Court of Appeals in the Dunne case and of the Supreme Court in the Hartzel case, both cited in this book, is that the law against propaganda and activities to overthrow the government by force or to cause insubordination in the armed forces aims only to punish utterances and acts which show intent and create a clear and present danger of causing the understandable offenses of violent overthrow of the government or insubordination or mutiny or refusal of duty in the armed forces. There can be no freedom of speech if criticism of or attack on "our democratic form of government and our institutions" or demand for their change are subject to being held to constitute the crime of causing or conspiring to cause insubordination in the armed forces.

Mr. Rogge:

I should say a word to you about conspiracy. The evidence will show that the Nazi movement was in existence for many years before there was a statute making participation in that movement a criminal offense. When the Act of June 28, 1940, became a law, any person who had previously been in a movement which had as its purpose interfering with and impairing the loyalty and discipline of our armed forces and continued that conduct, was guilty of an offense.

Comment:

Even before the passage of the Smith Act on June 28, 1940 it was a crime to join in a conspiracy to interfere with and impair the loyalty and discipline of our armed forces. That would have been clearly a conspiracy to bring about a violation of existing laws. Here Rogge is instructing the jury as to the law, something only the judge should do, and the instruction is wrong.

Mr. Rogge:

The way the law expresses the rule is that where persons are engaged in doing certain acts which become unlawful because of the passing of a statute, their continuance of those acts constitutes a violation of the statute. Any person who was in the movement prior to the date this statute was passed and who stopped actively the minute the statute made that conduct unlawful is not guilty of any offense, and, therefore, cannot be prosecuted.

The conduct which the Government charges was unlawful was that which occurred after the passage of the statute, the Act of June 28, 1940. Although the movement became unlawful only after June 28, 1940, it was in existence for many years prior thereto. Therefore, it will be necessary to show you what the movement was and what the activities of the defendants were in that movement before the statute was passed. However, the liability of the defendants does not begin until June 28, 1940, and it will be necessary for the Government to prove that each of the twenty-nine defendants was in the movement and did some act in furtherance of the conspiracy after June 28, 1940.

Comment:

In this particular passage the reader will note how definitely Rogge makes his case a historical thesis. He asks to go back to the beginning of the Nazi movement and develop his historical and theoretical interpretation of its purposes and activities. Right there he poses a historical and political thesis which cannot be susceptible of proof in a court of law. As Judge Jerome Frank says in his latest book *Fate and Freedom,* "history is twistory" and "the past is what we make it." Historical theses are matters of opinion and interpretation, not propositions susceptible of proof.

At this point it will be highly relevant to compare Rogge's undertaking in the Sedition Trial with the prosecution undertaking announced by Justice Robert H. Jackson in his report to the President of the United States on Trials for War Criminals released by the White House to the press on June 7, 1945. Justice Jackson outlined his plans "to try major war criminals whose offenses have no particular localization and who will be punished by joint decision of the governments of the Allies." It is to be noted that he does not propose to try his defendants within the framework of Anglo-Saxon trial by jury and the rules of evidence generally observed in this country and England. He says that they are to "be punished by joint decision of the governments of the Allies." This is not the same thing as being punished according to the law of the place where the crime was committed or lex loci. Against the persons to be tried as war criminals, the charges, Justice Jackson said, would relate to acts which he listed under three headings: "A. Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare. B. Atrocities and offenses, including atrocities and persecutions on racial or religious grounds committed since 1933. C. Invasions of other countries and initiation of wars of aggression in violation of international law or treaties.''

Now it is clear that each of the above three categories of charges relates to the commission of specific acts, which are alleged to be offenses against some law. The commission of these acts is a fact or a whole series of provable facts. It is not a historical thesis to say that the Nazis committed an itemized series of acts. It is a historical thesis to say that a given list of thousands of acts and utterances constituted some one alleged crime or conspiracy.

The debatable issues in these proposed war guilt trials will not be questions of fact. They will be questions of law and of legal or moral responsibility, of legal and moral standards. There will be no issue of fact as to the perpetration of numerous atrocities and brutal acts. The question will be whether the given Nazi on trial is legally or morally responsible for the commission of the specified atrocity.

Rogge's case in the Sedition Trial was of an entirely different order. He did not allege the commission of a single criminal act other than that of the joining and furtherance of the alleged conspiracy. He proposed to prove the existence of the conspiracy by stating his version of history. He proposed to prove the defendants joined the conspiracy by showing a pattern of perfectly lawful acts and utterances of theirs which, according to his theory, constituted the conspiracy or the joining of the conspiracy. The only issue was the validity of that theory.

It can be proved that the Nazis made the first declaration of war. But it cannot be proved exactly what was the Nazi plan for the Nazification of the world or even that the Nazis had one master plan. As to the utter impossibility of ever proving a Nazi master plan, the authors submit as conclusive the following passage from the Report of our wartime Chief of Staff, General Marshall, to the Secretary of War, dated September 1, 1945:

> The available evidence shows that Hitler's original intent was to create, by absorption of Germanic peoples

> in the areas contiguous to Germany and by the strengthening of her new frontiers, a greater Reich which would dominate Europe. To this end Hitler pursued a policy of opportunism which achieved the occupation of the Rhineland, Austria, and Czechoslovakia without military opposition.
>
> No evidence has yet been found that the German High Command had any over-all strategic plan. Although the High Command approved Hitler's policies in principle, his impetuous strategy outran German military capabilities and ultimately led to Germany's defeat. The history of the German High Command from 1938 on is one of constant conflict of personalities in which military judgment was increasingly subordinated to Hitler's personal dictates.

If Hitler's generals had no over-all plan for winning the war, how could Rogge expect to prove that the thirty defendants were following an over-all plan for the Nazification of America? Hitler's generals and party leaders could be shown to have carried out his orders. But no attempt was made by Rogge to show that any of the defendants in the Trial ever acted under orders from any Nazi principal. Instead, Rogge proposed to link them in a Nazi criminal conspiracy to cause military insubordination by showing that there was a Nazi master plan and that the words and acts of the defendants conformed to this plan. Right there his case had to founder. No such plan could ever be proved to have existed. General Marshall's Report officially says so.

Stating a Nazi plan is simply a matter of posing a hypothesis. The Nazi plan, in so far as there ever was one, seems to have been a matter of what Hitler's intuition decided from day to day. That, obviously, was no plan.

One can often prove entirely by circumstantial evidence that given persons planned a murder or some one or more criminal acts, or that they agreed on and acted pursuant to some criminal plan. But one cannot prove that the sum total of Hitler's intuitions constituted a plan. If a number of persons subscribe to some published program and acknowledge membership in an organization to carry it out, there may be a prima facie case for holding them guilty of conspiring to carry out any criminal features of that program. But, as already pointed out, the United States Supreme Court was not satisfied with even that quality of evidence in the Schneiderman case (320 U. S. 118). In its reversal of the lower courts in that case, the Supreme Court had the following to say on this point:

> Political writings are often over-exaggerated polemics bearing the imprint of the period and place in which written. Philosophies cannot generally be studied in vacuo. Meaning may be wholly distorted by lifting sentences out of context instead of construing them as part of an organic whole. Every utterance of party leaders is not taken as party gospel. And we would deny our experience as men if we did not recognize that official party programs are unfortunately opportunistic devices as much honored in the breach as in the observance.

In short, it is virtually impossible to prove a political conspiracy where the evidence consists exclusively of lawful utterances and acts, that is, if one respects the rules of evidence and uses common sense. The general and specific intent to do wrong is not to be lightly inferred from a selected pattern of lawful political activities and utterances.

Mr. Rogge:

Under the law of conspiracy a defendant may be guilty of violating the law if he joins the conspiracy knowing of its existence.

Comments:

Rogge seems unmindful of the case of Falcone v. U. S., 311 U. S. 205, in which the Supreme Court laid down the rule that knowledge alone is not sufficient to make one a conspirator.

If a distinguished historian like Professor Langer, writing in 1938, or an outstanding German born authority on Nazi Germany like Professor Drucker, writing in 1940, expresses uncertainty as to what was Hitler's plan or program at the time, how could all these defendants be held to have joined in a political conspiracy with Hitler with full knowledge of the plan and program so dogmatically and specifically set forth by Rogge? It is only reasonable to assume that if either of the authorities above quoted had known that Hitler was following a plan for Nazifying the world by means of undermining the loyalty of the armed forces at the time they wrote the articles above quoted, they would have made some mention of that rather important feature of the Hitler plan which according to Rogge had been publicly announced, was a matter of common knowledge and had been the subject of agreement and collaboration by all the defendants. The authors of this book challenge the government or any reader of this book to cite a passage from a published book outlining the Nazi plan Rogge postulated in his opening. So far as the authors know, in all the vast literature of an anti-Nazi character there is to be found nowhere a formulation of Nazi plans and Nazi ends and means that squares with Rogge's thesis.

Mr. Rogge:

Therefore, one defendant may have been in the movement long before June 1940, and continued in it after that date, in which case he would be guilty of the offense. Another defendant may have joined the movement for the first time after June 28, 1940 or even during the year 1941, but, nevertheless, he would be equally guilty of the crime. Now the Government will prove to you that these defendants were all in this conspiracy to violate this statute after June 28, 1940.

The evidence will show that a Nazi revolution in this country, according to the intentions of the Nazis and the defendants in this case, would have been like this:

Comment:

Right here it is pertinent to remark that a proposition of this character is both absurd and utterly impossible of proof, except, conceivably, on the basis of the showing of some one document purporting to be the revolutionary plan for America which plan had been officially endorsed by the Nazis and also subscribed to by all the defendants. In all the vast literature about the Nazis, written by anti-Nazis, one can search in vain for a single passage setting forth that it was the Nazi plan to cause a Nazi revolution in America by means of causing insubordination in the American armed forces.

Mr. Rogge:

A Fuehrer, and the evidence will show that the defendants had one in mind, supported by the defendants in the roles of subordinate fuehrers;

Comment:

Here Rogge displays abysmal ignorance of Nazi theory and practice, and here he does some obvious legal twisting. The Nazis had and, consistently with their doctrine, could have, only one Fuehrer. It was a fundamental part of their principles to have but one Fuehrer. Rogge charges in one breath that the defendants were agreed on duplicating in America the German Nazi pattern of revolution and, in the next breath, says they were divided into several groups, each under its own leader. Rogge goes on to name five different defendants and their five respective groups, whom he charges with conspiring "to take over the country" following the Nazi pattern of revolution by causing insubordination in the armed forces. Had these defendants been following the Nazi design, they would not have been working through five different groups but would have been co-ordinated in a single party under one leader. That is the essence of the Nazi Fuehrer or leadership principle, which Rogge accused the defendants of conspiring to follow.

Mr. Rogge:

Supported by the defendant Gerhard Wilhelm Kunze, Bundesfuehrer of the German-American Bund, and his Storm Troopers, the defendant William Dudley Pelley and his Silver Shirts, the defendant Joseph E. McWilliams and his Christian Mobilizers, the defendant George E. Deatherage and his Knights of the White Camelia, the defendant David Baxter and his Socis; supported by the defendant Lawrence Dennis, the Alfred Rosenberg of the movement in this country, who supplied ideas to such defendants as McWilliams and Deatherage; and supported by all the other defendants, would take over the country and abolish our constitutional, representative form of government.

Comment: ...

Apropos of the characterization by Rogge of Lawrence Dennis as the Alfred Rosenberg of the movement in this country, two government expert witnesses testified that they had read Lawrence Dennis and Alfred Rosenberg and that there was no similarity between them as writers or thinkers. Another government witness, Peter Gissibl, called to testify as a former Bund member and official, was cross examined by Lawrence Dennis as follows:

Q. Have you ever seen Lawrence Dennis before you came to this trial?

A. No.

Q. Do you know who Alfred Rosenberg, the philosopher of National Socialism, so-called by the prosecution—do you know who Alfred Rosenberg is?

A. Yes, sir.

Q. Did you ever read any of his writings?

A. Yes.

Q. Did you ever read any of the writings of Lawrence Dennis?

A. No.

Q. In the German-American Nazi movement, did you ever hear Lawrence Dennis referred to as the Alfred Rosenberg of America?

A. No, I never heard of him.

Given such testimony by the government's own witnesses, how could the statement by Rogge that the evidence would show that Lawrence Dennis was the Alfred Rosenberg of the movement in this country possibly have been made in good faith?

Dr. Hermann Rauschning, star witness for the prosecution, was cross examined by counsel Bilbrey on this point as follows (13456 of the Record):

Q. Now have you ever read, Dr. Rauschning, any of the literature or writing or books of any of the defendfendants in this case?

A. I did look into the book of Mr. Dennis which was entitled *The Dynamics of War and Revolution.*

Q. Have you read the literature of the other defendants?

A. No, I do not even know that they have published any books.

Q. Do you find any Nazi doctrine in the book called *The Dynamics of War and Revolution* by Mr. Dennis?

A. This book is a very intelligent book. And it reminds me of publications of sympathizers of National Socialism, who were not exactly National Socialists but who paved the way to National Socialism.

Q. To what do you refer?

A. I have in mind especially a group in Germany which was called *Tat Kreis.* They were intelligent writers who partly shared the opinions of National Socialism, but were too intelligent to share the obviously stupid and silly parts of this National Socialist program.

Dr. Rauschning was further cross examined by defendant Dennis as to Dennis' book *The Dynamics of War and Revolution.* Rauschning did his best to avoid contradicting the prosecution thesis in regard to this book but had to make admissions such as the following (13619 of the Record):

Q. Well, now, do you consider that a Nazi book?

A. It is certainly not a Nazi book, in the sense of real literature of Nazism.

Rauschning then went on to compare Dennis' book with Spengler's great work, *The Decline of the West,* for which compliment Dennis thanked the witness. Books such as these, according to Rauschning, had paved the way for Nazism in Germany. It is hard to believe that an Administration which professed attachment to the principles of freedom of speech and opinion could indict a book for being like Spengler's *Decline of the West.* When Dennis pressed Dr. Rauschning for amplification, he replied (13,621 of the Record):

A. If I remember this book (Dennis' book, *The Dynamics of War and Revolution*), the gist of this book is this: there is a great revolution and a war is unavoidable. The war will drive the revolution, the development of this crisis, in a much sharper way forward. Capitalism, the whole democratic system, are, or have been in a way revolutionary movements, but now they have lost their dynamic power. Am I right?

Q. That is right.

A. So we have to find some new movements, and the new order will definitely be not a democratic one and not a capitalistic one.

Well, in the summer of 1945, at the time this book was being written, commentators generally were saying that capitalism had lost the war and that socialism had won it. Certainly the British elections of July 1945 confirmed Dennis' analysis and forecast penned in late 1939. Briefly, both Dennis and Hitler had said capitalism was doomed; therefore, Dennis was writing Hitler's line. Rauschning went on (13621-13622 of the Record):

> A. Yes, he says, even if I am not quite right, he uses the words, the American brand, or something like this, of National Socialism. As I understand, he means not by National Socialism exactly this National Socialism of Germany, but to put it in contrast to International Socialism. But as a whole, this book gave me the impression that we are on the threshhold of the decline of Western civilization and that the old principles of our order are outmoded. Now if I may say, objectively, that the real thesis of this book is working in the line of National Socialism, in the propaganda of Hitler. Out of the book alone one cannot say that the author is making National Socialist propaganda, but definitely he is anti-democratic. He is more for a new order.

Dennis said in the book in reference, indicted by the Department of Justice, that the world was moving towards socialism and that national rather than international socialism seemed likely to prevail. Well, the war has ended with two of the big three victors socialist, and it is surely a tenable position to take, as Dennis has done consistently, that the socialism that has won out in Britain is national rather than international.

Mr. Rogge:

They intended to impose on us a one-party system, just as the Nazis had done before them in Germany. The evidence will show that they intended to abolish the Republican and Democratic Parties. The evidence will show that they intended to abolish freedom of speech, freedom of the press, freedom of assembly, freedom from arrest without cause, and all the other civil liberties guaranteed to us by the Constitution.

Comment:

In the light of the Supreme Court dicta in the Schneiderman and Bridges cases, how could the intent just alleged ever be proved except by direct evidence consisting either of statements by the defendants that such were their intentions or of acts subscribing to a program proclaiming these alleged designs? And, even if all the defendants had openly subscribed to a program of setting up a totalitarian slave state in America, it is hard to see how this would have run afoul the law of June 28, 1940, unless they proposed to bring about such a new order by means of the violent overthrow of the government or the causing of insubordination in the armed forces or both. There was and is no law against advocating all the changes Rogge charged the defendants with advocating provided such advocacy does not call for the use of violence and insubordination in the armed forces.

Mr. Rogge:

Thereafter, the evidence will show they intended to run this country not according to our Constitution but according to the so-called "fuehrer" principle and the Nazi concept of Aryanism.

The fuehrer principle means that the fuehrer is the state, that his word is law, that his every command, no matter what it involves, will be carried out by his confederates without question.

The Nazi concept of Aryanism means that only such portions of the population as the fuehrer designates shall have full civic rights. In fact, that is an understatement.

The evidence will show that the defendants themselves talked in terms of blood baths, or blood flowing in the streets, of hanging people from lamp posts, of pogroms. One of the defendants stated that our pogroms in this country would make Hitler's look like a Sunday-school picnic.

That is what a Nazi revolution would mean in this country, according to the plans and intentions of the defendants.

The evidence will show that the Nazis, and the defendants after them and with them, regarded themselves as the enemies of democracy. According to them, democracy was decadent. It was weak, false, rotten, corrupt. It was senseless and dangerous. It was a monstrosity of filth. There was no principle, according to the defendants and the Nazis, that was as wrong as that of democracy. The Nazis and the defendants were going to destroy it throughout the world.

Comment:

The irrelevancy of all this inflammatory talk to the charge of conspiring to cause mutiny and insubordination in the armed forces is obvious. The defendants, of course, would have denied these allegations of intent, but, even if they had held the views and intentions about democracy alleged, that would have had nothing to do with causing insubordination in the armed forces. No evidence was promised, offered or available to sustain Rogge's sweeping statements in this respect, even as to Hitler, who often declared that his regime was a democracy.

Statements involving a use of the term democracy are simply not susceptible of proof in a criminal trial since they at once raise disputed issues of definition. Soviet Russia calls its system a democracy. So did Nazi Germany. It is the vogue now to call the American system a democracy, though the Constitution makes no use of the term democracy, calling ours a "Republican form of government." "The United States shall guarantee to every State in the Union a Republican form of government." At all events, our system and that of Soviet Russia, both now being called democracies, are as radically different as our system and that of the Nazis. What has talk about or for or against democracy, whatever one may decide to be the definition of the term thus used, got to do with counseling or advising mutiny, insubordination or refusal of duty in the armed forces?

Mr. Rogge:

Many of us are inclined to identify Nazism with Germany alone. But that is not the whole truth. The evidence will show that the Nazi conspiracy was world-wide in its scope. The Nazi conspirators, even the ones within

Germany itself, came from all over the world. Germany was simply the place where they first got a foothold.

The conspirator Hitler was born in Austria. The conspirator Rudolf Hess, Deputy Fuehrer, was born in Alexandria, Egypt. The conspirator Alfred Rosenberg, one of the idea men of the movement, was born in Russia. The conspirator Ernest Wilhelm Bohle, head of the foreign organization of the Nazi Party, was born in England. And Walther Darre, head of the Reich Office for Agricultural Policy, was born in Argentina.

Comment:

This paragraph reveals the depths of intellectual dishonesty to which Rogge was prepared to descend in his effort to make out a case and impress the jury without any evidence relevant to the charge. Here he reasons that Nazism is not to be identified with Germany alone but with the whole world, or that it is an international movement, because Hitler was born in Austria; Hess, in Egypt; Rosenberg, in old Russia; Bohle, in England and Darre, in Argentina. Could anything be more absurd? If each of the five leaders had been citizens or nationals of the states in which they were born and of a non-German racial extraction, there might have been some point to Rogge's argument. But each of the five just named are or were as German in ancestry, language and culture as any one could be. The accident of the place of their respective births has absolutely no probative value or significance so far as sustaining the false proposition that Nazism was an international movement. Even the harshest critics of Nazism do not say that, but rather emphasize the obvious fact that Nazism was nothing if not national and German.

It would make sense to argue that communism is an international movement because Marx was a German Jew who did most of his writing in England, while Lasalle, another founding father, was a Frenchman, while Lenin was a Russian and Stalin an Asiatic Georgian. But to show that all these founding fathers of Marxism had been Russians or Germans born in different parts of the world would have absolutely no significance as proof that communism is an international or world-wide movement. Germanism is no international movement because Germans happen to be living and exerting influence all over the world. An ism or a system can only be fairly called international if it admits to full participation people of all nations and nationalities. Capitalism does this. Communism does it. Roman Catholicism does it. Germanism does not. Neither did Nazism. Possibly the British commonwealth of nations might be called somewhat international because it admits to full citizenship many different nationalities or peoples, as the French Canadians or the South Africans of Dutch ancestry. If Nazism had any one unvarying principle it was the assertion of extreme nationalism, racism and Germanism coupled with violent negation of internationalism in all its forms. The fact that Rogge was reduced to the necessity of trying to prove that Nazism was international by showing that five prominent Nazi leaders, all as German as they could be, were born in different parts of the world is proof of the utter bankruptcy of his case.

Mr. Rogge:

These Nazi conspirators and their confederates in Germany thought in terms of destroying democracy throughout the world.

The conspirator Hitler stated that he set forth a program which deliberately struck the pacifist, democratic world a blow in the face.

In 1922, he declared that two worlds were struggling with one another. In 1940, he declared that the war was one in which more than the victory of one country or the other was at stake. It was rather a war of two opposing worlds.

Comment:

We have no interest in defending Hitler against misrepresentation, but, out of fairness to the defendants in this trial who denied any affiliation whatsoever with Hitler or Nazism, we deem it important to point out here that "the two worlds in conflict" statement of Hitler's on December 10, 1940 to which Rogge here refers really divided the world into the capitalist and socialist powers. At that moment Hitler was allied with Stalin and Russia. Then Hitler was characterizing Germany's enemies as the "pluto-democracies" and delivering a characteristically anti-capitalist and pro-socialist harrangue. The speech, as a whole, only Hitler could have produced, but most of the ideas or formulations in it could be found in the utterances of all socialists and radicals. It is now and long has been a commonplace, not only of Nazi and left-wing writers of all shades, but also of many conservatives to say that the socialist and capitalist worlds are in conflict, and that one or the other must prevail, the one that does not win out thus going under. If this sort of statement makes one a Nazi or a communist, then most recent writers on current trends are subject to that indictment. But what has all this to do with conspiring to cause insubordination in the armed forces?

Mr. Rogge:

On the one side was democracy, and on the other side, Nazism. He said that those two worlds were face to face with one another and that one or the other had to succumb.

Comment:

If the present day world is to be divided into socialist and capitalist sections, which is the side of democracy? Are we on the same side as Russia? At the time Hitler made the two worlds in conflict statement, he was on the same side as Russia.

Mr. Rogge:

The defendants in this case joined this world-wide Nazi movement to destroy democracy throughout the world.

Comment:

We ask the following question: When Stalin and Hitler made a pact on August 23, 1939, which touched off the Second World War, did Stalin join the alleged world-wide Nazi movement to destroy democracy throughout the world or did Hitler join the Communist movement to destroy capitalism throughout the world? The partnership between Hitler and Stalin during the period from August 1939 to May 1941 was a matter of signed pacts and joint military collaboration, as in the partitioning of Poland. Rogge could show no such partnership between the defendants and Hitler.

CHAPTER IX.

PROSECUTOR'S OPENING STATEMENT (Continued).

Mr. Rogge:

The evidence will further show that, in order to bring about a Nazi revolution in this country, the defendants intended to and they did use the same tactics that the Nazis successfully used to seize power in Germany in 1933.

The evidence will show that a Nazi revolution, the way the Nazi conspirators brought it about in Germany and the way the defendants hoped to bring it about in this country, was to take place in two phases: a pre-revolutionary phase and the actual seizure of power.

Comment:

Once again, we must call the reader's attention to the unprovable character of propositions such as the above which Rogge said the evidence would sustain. Even if all the defendants had openly subscribed to a program saying just what Rogge said, it would still fall short of proof that they intended to carry out in this country a Nazi revolution in the same way the Nazis had done in Germany. Anything as patently impossible as carrying out in America a revolution in the same way the Nazis had done it in Germany is not proved to be the intention of any group by the mere fact that they said something to that effect. Here the clear and present danger rule applies. In the Sedition Trial the government had no such statement of the defendants to offer. Instead, Rogge proposed to have this intention on the part of the defendants inferred from all manner of utterances not only by them and their alleged co-conspirators but by others as well—a truly farcical undertaking.

In this connection it is pertinent to remark that there was no evidence presented to show that any of the defendants knew how the Nazis had come to power in Germany or had any understanding of the Nazi pattern of coming to power. On the contrary, it was brought out on cross-examination that many of the defendants about whom different government witnesses testified had never displayed the slightest knowledge of Nazi doctrines, Nazi institutions or Nazi history. Witnesses who had been linked with certain defendants in political activities freely admitted that they knew little or nothing about Nazism, its philosophy, teachings and doctrine or its history and policies in application in Germany. About the best Rogge could offer in the way of evidence supporting his assertions that the defendants were planning to follow the Nazi pattern in America would be something in the nature of an expression of opinion or feeling to the general effect that Hitler or the Nazis had the right idea about the Jews or the communists and that something of that sort ought to be tried here in America. Such expressions of opinion, of course, were attributed by some testimony only to a few defendants, by no means to all of them. Obviously, these expressions in no way proved or even created a presumption that those who made them understood Nazism, the Nazi pattern or the Nazi system, either in theory or in practice. They merely indicated some measure of approval of measures and policies aimed at the Jews or the communists.

To show the absurdity of Rogge's contention that the defendants were all conspiring to repeat the Nazi revolution in America, defense counsel St.George, on cross examination of the expert, Dr. Rauschning, asked him whether Hitler with only forty cents in his pocket (defendant Elmer Garner had died in the first month of the trial with forty cents in his possession) and with twenty-six impecunious followers at his back could have put over Nazism in Germany. Dr. Rauschning replied emphatically: "Certainly not." And the same defense counsel, on cross-examination of the government expert, Dr. Kempner, elicited from that authority on the Nazis that for the defendants to foist Nazism on the United States they would have to elect a President, win over the army, amend the Constitution to make it include an article similar to Article 48 of the Weimar Constitution and, finally, they would have to burn down Congress!

Mr. Rogge:

During the pre-revolutionary phase, the Nazi conspirators and the defendants hoped to disintegrate and soften the existing social structure so that the ultimate seizure of power would be easy. They hoped to accomplish this by a mass propaganda campaign, inciting people to hatred of democratic, representative government and to hatred of various groups and classes; by resorting to terrorism, for which the uniformed Storm Troopers served as a convenient tool; by exploiting and abusing the rights and privileges given to them by a democratic, representative form of government; by offering participation in the spoils to those who joined the conspirators; and, what is most important for your consideration here, by causing the Army to be disloyal to the existing democratic, representative form of government.

Once the Nazi conspirators and the defendants had disintegrated the existing social structure, then they intended, as an organized minority, with the support of at least a section of the armed forces, simply to seize power.

Comment:

At this point a somewhat lengthy digression on how the Nazis came to power would seem in order. And here we do not propose to advance our own thesis as to how the Nazis came to power. We do not pose as German historians or authorities on Nazi history. We merely propose to cite a few quotations from authorities, not to give the reader the truth about the manner of the Nazi advent to power, but exclusively to show the reader that the authorities on this subject are unanimous in contradiction of Rogge's thesis about the Nazi revolution. We contend that no detailed explanation or interpretation of how the Nazis came to power can possibly be susceptible of proof within the framework of trial by jury. One might as well try to prove in trial by jury just who and what caused the American Civil War or what, if any, American official was responsible for Pearl Harbor, about which controversies are now raging. Historians and authorities, like laymen, will divide on a question of this sort according to their background, depending on whether they come from north or south of the Mason-Dixon Line.

How the Nazis came to power is not what lawyers call a justiciable issue. We now ask our readers to keep in mind Rogge's assertion in the last-quoted sentence that the defendants intended to come to power as did the Nazis in

Germany, first, by disintegrating the existing social structure, and, then, by seizing power with the aid of a section of the armed forces whose loyalty to the existing government they would have previously subverted. We beg our readers to keep these assertions of Rogge in mind as they read a few representative quotations we shall submit from recognized authorities on the Nazi Revolution, its history and mechanics. All of these authorities are violently anti-Nazi. We shall quote first from a book published the year Hitler came to power, entitled *Germany Puts the Clock Back*. It was written by Edgar Ansel Mowrer, an American newspaper correspondent, in charge of the Berlin office of *The Chicago Daily News* who won the Pulitzer Prize for the best series of articles in 1932, as he reported the final steps of the Nazi rise to power. We quote from chapter VII on ''The Revival of Militarism'' (page 57 of the Penguin Edition):

> The generals forcibly hammered the German people to a single purpose, the old army. As a weapon it was incomparable. But when it broke—a catastrophe symbolized by Ludendorff's flight to Sweden behind a pair of blue spectacles—and the component parts recovered their human individuality, the power slipped from the nerveless hands of the generals.
>
> Fritz Ebert, the saddler President, Philipp Scheidemann, the tailor, Gustav Noske, the carpenter, snatched it from the street where the communists were about to seize it—and handed it back to the astonished generals. Through patriotism. Through fear of communism. Through abhorrence of disorder. Through the deference obviously owed by the lower orders to their social superiors. Ebert knew his place.
>
> Militarism is not a matter of the number of soldiers maintained by any country, nor even of the frequency and ruthlessness of its wars. Militarism is a condition in which the armed forces are allowed to be the ruling factor in the State, independent of the civil government, with political aims and ideals of their own. In this sense the Germany of 1932 was as militaristic as the one of 1914.
>
> The little Reichswehr of a hundred thousand professional soldiers completely dominated the Republic. No

> government could stand a week without its support. Germany was a more or less veiled military dictatorship —as the adherents of the military power finally decided to admit. In the words of the former Reichswehr Minister Wilhelm Groener, the Reichswehr "had become a factor which no one could pass over in political decisions." (*Zeitschrift fuer Politik,* March, 1932.) In other words, through its influence on the President and the menace inherent in its homogeneity and power, thirteen years after the Revolution the Army once more had the last word in the government. This was militarism in its purest forms.

The reader will note that Rogge makes pre-Hitler Germany out to be an exemplary democracy which Hitler and the Nazis took over by subverting the loyalty of a part of the army to democracy. Mowrer and every writer on this subject the authors of this book have ever read contradicted Rogge's thesis. They all agree that the Weimar Republic was dominated by the army or the Reichswehr, whose highest authority and symbol was Reichspresident Hindenburg; that the army had no use for the leaders or principles of the Weimar Republic; and that the majority in the army finally came to regard Nazism and communism as the two alternatives they had to choose between and naturally chose Nazism as being more in harmony with the spirit, traditions and long run objectives of German militarism. The consensus on this point is overwhelming: Hitler did not subvert the loyalty of a part of the army from the Weimar Republic to Nazism; Hitler won over the majority of the army which enabled him to come to power in a perfectly legal or constitutional manner.

Of the period immediately preceding Hitler's coming to power, Konrad Heiden writes in his book HITLER (published by Knopf, 1936, page 242):

> He had three opponents: Hindenburg with the Reichswehr; Hugenberg with industry; and, finally, the parties. Hindenburg had the arms; Hugenberg, the money; the parties, the masses. After five years labor, Hitler had contrived to entice away the masses from the parties—from the bourgeois parties. His second task was to get the money from Hugenberg. But all was overshadowed by the third necessity—to come to an understanding

> with the representatives of armed strength. For in this chaotic time the decision rested with armed strength; the money would follow it, not vice versa. The struggle for the Reichswehr went on.

All this indicates that Hitler and the Nazis went about coming to power in the only way any political party in the Germany of that period had any chance of success. An English professor and an authority on this period, John Wheeler-Bennett, in his book entitled *Wooden Titan: Hindenburg in Twenty Years of German History,* 1914-1934, wrote on page 291:

> In his person, therefore, Hindenburg wedded the army to the Republic, and whilst he remained President nothing could shake this loyalty. Every attempt by Hitler, both before and after he became Chancellor, to seduce the Reichswehr from its personal allegiance to the President met with ignominious failure, and it was not till after Hindenburg's death that he was able to exact from them an oath of fealty.

There is a categorical denial of the major premise of the prosecution case as outlined by Rogge. And the denial comes from a competent British historian and student of Nazi Germany.

A thoroughly scholarly and exhaustive study of the legal issues and technicalities connected with the Nazi advent to power in 1933 was written by Frederick Mundell Watkins and published by the Harvard University Press in 1939. Defendant Dennis used it extensively in cross examining government witness Dr. Kempner. This witness had, of course, to confirm everything Dennis asked for, taken out of the Watkins book. From it we reproduce the following paragraph on page 110, which also contradicts the Rogge thesis as to how Hitler came to power:

> With all the advantages of their situation, however, the National Socialists were still by no means prepared to depart openly from the precedents of German constitutional life. Respect for the forms of law had still to be reckoned as a powerful political force. If the extremists had proceeded at once on a course of flatly illegal action, they would still have been in danger of provoking a repetition of the old Beer Hall fiasco. In the

rapidly aging mind of the President one of the few fixed ideas seems to have been a desire to save his honor as a soldier by living up to the terms of his constitutional oath. Even at the risk of civil war he would probably have summoned up his waning energies sufficiently to order out the Reichswehr against any chancellor who tried under his signature to perpetrate a clear-cut violation of the Weimar Constitution. *The Loyalty Of The Army To Its Honored Wartime Commander Was Secure Beyond All Question.* To attempt an illegal coup under these conditions would have been extremely unwise. For the time being, at least, there was no real choice, therefore, but to continue acting within the established framework of the Weimar Constitution.

We could go on piling up authority on authority in contradiction of Rogge's historical thesis about the Nazi revolution. It seems unnecessary. Rogge's thesis has the support of not a single writer that we know of, and we have read pretty extensively in this field. We shall add one more pertinent quotation from a late book on Nazi Germany, written by Emil Ludwig, than whom no writer on Nazi Germany could be more anti-Nazi or widely read in this country. This book, published in 1945 is entitled *The Moral Conquest of Germany.* It was reprinted in digest form in the *Readers' Digest* of June 1945, from which we quote the following:

> Furthermore, Hitler is the only modern dictator who gained power by legal means. The others all used armed force to take over the government. The Germans, in 1932, in their last free elections, having choice among eight principal parties, cast 12,000,000 votes for the Nazis, against 7,000,000 for the Socialists. Hitler had openly displayed his political program, and these 12,000,000 clearly expressed their wish to see him in power. Indeed, no American President ever rode to Capitol Hill with more legal right than Hitler on his way to the Wilhelmstrasse on January 30, 1933. Hindenburg had appointed him chancellor on the ground of the numerical strength of his party in parliament.

And Dr. Hermann Rauschning, the government's star witness in the Sedition Trial, confirmed all that has been set forth in the above quoted authorities and admitted the inaccuracy of Rogge's statements in respect to the Nazi revolution, as will appear further on in quotations from his testimony. Let no reader suppose for a moment that we are here defending or exonerating Hitler or the Nazis. We are merely presenting the unanimous consensus of all the anti-Nazi historical interpretation we have been able to find on the point at issue. Incidentally, this happens to be lending support to the position of the Allied Governments as to the moral responsibility or guilt of the German people in connection with the war and the acts of the Nazi regime. The whole point of the above quotation from Emil Ludwig was to refute any claim that the German people were not to blame for Hitler and the Nazis, or that the regime of the latter was one that had come to power without the consent of the German people or in an illegal and violent or subversive manner, as Rogge argued.

The big point in showing up Rogge's unfounded thesis about the Nazis is not to clear the Nazis but to impeach Rogge. If he was capable of presenting a historical thesis that runs counter to the unanimous consensus of historical interpretation and evidence (and that we show) he was capable of fabricating a similarly unfounded case against the defendants. There was less excuse for being wrong about these points of Nazi history than for being wrong about the activities of the obscure defendants.

Some reader might say: "Well, it matters little whether the defendants wanted to come to power by legal means or not if they wanted to do what the Nazis did after they came to power." Here we face an issue that will have to be left to a later chapter, the issue whether the end of convicting the defendants justifies any means of convicting them. We have said at the outset that we do not intend to make a defense of the defendants or an exposition of what each believed, taught, advocated or wanted to accomplish. We have not the facts or the means of getting them to state the case of each defendant. It is much easier for us to talk about the history of the Nazis than that of each defendant because there is an abundance of authoritative literature on the former and none on the latter.

We do, however, point out here that admissions were wrung on cross-examination from several government witnesses that the defendants about whom they testified never displayed any knowledge or understanding of Nazi theory, practise or history. No evidence that they did was introduced during the Trial. Again, we repeat, we are not trying in this book the defendants. We are trying the government's prosecution theory, allegations and, in this chapter, more particularly, the prosecutor's opening statement in which he committed the government to proving things which are contrary to all historical versions we have read.

If any defendant believed that the Nazi pattern of revolution in Germany could be repeated in the United States, if any defendant understood that pattern, and if any defendant intended to help carry it out in the United States, the evidence did not so show. If, however, the evidence had so shown in respect of any defendants it would have been proof that such defendants were harmless lunatics and it would not have proved any criminal conspiracy. It was and will remain physically impossible for any group to follow the Nazi pattern in the United States. Conditions are too utterly different in the two cases. If, as historians generally agree, Hitler came to power in a constitutional manner, and if the defendants intended to come to power as a political party in a constitutional manner in this country, there would be no basis for a criminal conspiracy charge against them for so working together. Actually, of course, there was no evidence either that the defendants were agreed as to ends and means or that they knew and shared the objectives of the Nazis.

To sum up the consensus of authoritative opinion about and interpretation of the Nazi rise to power, it may be said that Hitler won over the German army to his cause. He did not try to undermine the loyalty of the German army. On the contrary, he won over the German army leaders, who were not loyal to the principles or leaders of the Weimar Republic, but wanted a restoration of the monarchy and thought Hitler might be a right step in that direction.

Hindenburg, as Rauschning says in his book, *The Revolution of Nihilism,* wanted a restoration of the monarchy and called Hitler to power with this ultimate objective in mind. The German army enabled Hitler to make himself a dictator of Germany by a series of legal and constitutional steps precisely because the German army believed that Hitler stood for discipline and militarism. Nothing could be more absurd than Rogge's theory that Hitler won over the German army by advocating insubordination in the armed forces. That is the way the communists once thought and taught they might come to power. But a leader and a party coming to power that way do not make a bid for or ever get a call to power from a man like Hindenburg who was the living incarnation of discipline and military tradition or from the highest generals of an army like that of Prussia, as did Hitler and the Nazis. For a political leader and party to win over the officers of an army like that of Germany, from the top down, is hardly the same thing as following the communist tactic of advising, counseling, urging and causing insubordination in the armed forces. And surely no sane person could believe that a leader with Hitler's plans for Germany ever tried to cause insubordination in the armed forces.

It is conceivable that a purely American movement or political demagogue might have many of the objectives of the Nazis and Hitler for this country, and that they might try to come to power in order to realize these objectives. But such a leader and such a party would not, in any way, follow or attempt to follow the Nazi path to power, not if both were rational and had any serious potentialities. Such a movement or demagogue might study Andrew Jackson or Huey Long, but never Hitler. We have no equivalent of the German army. We have no Hindenburg. We have no Prussian militarist caste or tradition. We have no Article 48 of the German Constitution which enables the President to do all sorts of things to facilitate the legal inauguration of a dictatorship. Any would-be demagogue who thought to imitate Hitler's methods or technique in the United States would be as harmless as a man who believed he was Napoleon and was going to imitate Napoleon's rise to power in France. He would be harmless simply because he would be crazy if he believed any such thing. If the defendants believed they could follow the Nazi pattern in this country and confederated to do so, they should either have been committed to an institution or disregarded as harmless lunatics, unless they committed criminal acts in the pursuit of their mad scheme. In that event, their conviction or commitment to an asylum would have been easy.

Mr. Rogge:

Let us look for a moment at the tactics to be employed in the pre-revolutionary phase of a Nazi revolution. Let us look first at the nature of the propaganda which the Nazis and which these defendants employed. Propaganda, the way the Nazis and the defendants were going to use it, was described by the conspirator Hitler as a frightful weapon in the hands of an expert. Its only purpose was to confuse the masses and win them to one's cause.

The conspirator Hitler set out many of the characteristics of such propaganda in his book *Mein Kampf*. In the first place, such propaganda had no concern with the truth. It had to be neither truthful nor consistent. In the second place, such propaganda had to appeal to the emotions rather than to reason. In the third place, such propaganda had to limit itself to a few things and to repeat these things eternally. In the fourth place, such propaganda should not scatter the attention of a people but rather concentrate it on what was made to appear to be a single opponent.

The conspirator Hitler stated that it was a part of the genius of a great leader to make even quite different opponents appear as if they belonged in one catgory, because, according to him, the recognition of different enemies led people to begin doubting their own cause.

When the conspirator Hitler said that propaganda had to appeal to the emotions rather than to reason, the emotion which he, and the defendants after him, had in mind was hate. People had to learn to hate. According to the conspirator Hitler, people had to learn to hate and hate and again hate.

The defendant Joseph E. McWilliams stated that Hitler had made hate work in Germany, and that he, McWilliams, was going to make it work here to accomplish a similar purpose.

Comment:

Suppose the defendant named had said just that, what would it prove of relevancy to the charge of conspiracy to cause mutiny, insubordination in the armed forces? There was never a great war or revolution, including the American Revolution and the American Civil War, in which hate was not a major factor. Any supporter of a major social reform has always aimed to arouse passions against the conditions he has sought to end or reform and against those whom he has held responsible for such conditions.

Mr. Rogge:

According to the conspirator Goebbels, his job was to arouse the masses to volcanic passion, to organize anger, to set the masses in motion, to organize hatred and despair with ice-cold calculation, that is, so to speak, according to him, with legal methods.

The Nazi conspirators in Germany and the Nazi conspirators and the defendants in this country appealed to and hoped to unite all the malcontents, all those who bore resentment for one reason or another, everyone who nursed a grudge. They wanted to unite this discontented mass under the single concept of "Aryanism" and to teach it to hate certain alleged enemies designated by such conveniently broad and simple terms as "democracy," "Jews," "plutocrats," or "communists"—which, as far as possible, were to be identified with one another in the public mind.

The emphasis was on anti-Semitic propaganda. The Nazi conspirators and the defendants considered anti-Semitic propaganda in all countries an almost indispensable part of the world-wide Nazi movement. By attacking the Jews, the Nazi conspirators and the defendants hoped to destroy the feeling for law and order of the whole world.

Along with the creation of hatred of the Jews, the Nazi conspirators in Germany, and the Nazi conspirators and the defendants in this country, in accordance with the tactic which Hitler had laid down of making different opponents appear as if they belonged in one category, sought to label everything they opposed as "Jewish," and to identify this label with Communism. According to them, democracy was Jewish. The international bankers were Jewish. Communists were Jewish. All Jews were Communists. By this process, of course, international bankers became communists, when, of course, they were just the opposite of Communists. But that made no difference to the propagandists. If the masses of the people were unable to stop and notice the inconsistencies, then the propagandists were accomplishing their purpose.

Another characteristic of the propaganda which the Nazi conspirators and the defendants used was that of accusing someone else of doing what the Nazi conspirators and the defendants themselves were, in fact, doing. For example, the evidence will show that the Nazi conspirators in Germany and the Nazi conspirators and the defendants in this country wanted to bring about a Nazi revolution. To provide a smoke screen, they accused the Communists of plotting such a revolution, and under that smoke screen, they hoped to accomplish their own revolution.

Or again, the Nazi conspirators and the defendants in this case were in a world-wide conspiracy. In order to provide a smoke screen for themselves, they assert that someone else is in a world-wide conspiracy.

Or still another illustration, the Nazi conspirators betrayed Germany, and the defendants, in conspiracy with the Nazis, attempted to betray our form of government. The Nazis in Germany, in order to hide their own conduct, asserted that the existing government in Germany was betraying Germany, and the defendants in this case, in order to hide their conduct, asserted that our Government was betraying our country.

Still another characteristic of the propaganda which the Nazi conspirators and the defendants used was that of cloaking themselves with the highest motives. Not only did the Nazis and the defendants accuse someone else of doing what they themselves were, in fact, doing, but they also asserted that what they themselves were doing was of the most patriotic and Christian nature.

They sought to destroy, but they asserted that they were doing just the opposite. They sought to abolish our democratic, representative form of government, but they asserted that they were doing it in the name, of all things, of patriotism. They wanted to get us to hate some of our fellow-Americans, in fact, to hang them from lamp posts, but they wanted us to believe they would be doing it in the name, of all things, of Christianity.

Accordingly, the evidence will show that the defendants filled the labels which they gave their various organizations and publications with high-sounding names.

The Bund, for instance, called its newspaper in later years — the early name of that paper was "Deutscher Weckruf und Beobachter"—but in later years they labeled it with the high-sounding name, "The Free American."

The defendant Elizabeth Dilling called her organization, "Patriotic Research Bureau."

The defendant Joseph E. McWilliams called his organization, "The Christian Mobilizers."

The defendant William Dudley Pelley had one publication which he called "Liberation" and another publication which he called "The Galilean."

The defendant Robert Edward Edmondson issued what he called, "American Vigilante Bulletins."

The defendants Frank W. Clark and Lois de Lafayette Washburn called their organization, "The National Liberty Party," and they put out material which they called "Yankee Freeman" and "Yankee Minute Men."

This, in brief, is the nature of the propaganda which the Nazi conspirators and the defendants after them and with them employed.

Comment:

Why is there not in all these paragraphs of denunciation of and argument against the defendants and their propaganda one specific offer of one piece of evidence, in the form of spoken or printed words by a single one of the defendants inciting, advising, counseling or urging insubordination in the armed forces?

Mr. Rogge:

The Nazi conspirators in Germany supplemented their mass campaign of propaganda, inciting people to hatred, with terrorism. The conspirator Hitler stated in his book *"Mein Kampf"* that he achieved an equal understanding of the importance of physical terror toward the individual and toward the masses. Uniformed bodies of Storm Troopers were an ever-present vehicle for the purposes of terrorism.

In engaging in a planned, mass campaign of propaganda inciting people to hatred and resorting to uniformed bodies of Storm Troopers and terrorism, the Nazi conspirators were exploiting and abusing the rights of freedom of speech and freedom of assembly given to them by the existing Government.

But the rights of freedom of speech and of assembly were not the only rights which the Nazis exploited and abused. They became members of the Reichstag not in order to cooperate with the Government but in order to obstruct and paralyze the operation of the Reichstag. The Reichstag, in Germany, was a representative body selected by the votes of the people and similar to our Congress.

In addition to a mass campaign of propaganda inciting people to hatred, in addition to the use of Storm Troopers and terrorism, in addition to the exploitation and abuse of the rights and the privileges granted by a democratic representative form of government, the Nazi conspirators offered a participation in the spoils to those who joined with them.

Last, and most important for your consideration, the evidence will show that the Nazi conspirators in Germany and the Nazi conspirators and the defendants in this country appealed to members of the armed forces to be disloyal.

Comment:

No evidence whatsoever was submitted in the seven and a half months of trial to substantiate this specific charge. Of course, on Rogge's general theory of the offense, anything the defendants may have said in criticism of the government or of our institutions, policies or political leaders was intended and calculated to cause insubordination in the armed forces. Well, it may be plausible to reason that anything said to belittle the commander in chief of the armed forces tends to impair the loyalty and morale of the men serving under him. But, on that theory, there could be no political opposition or agitation for a change of Presidents. Obviously, no such loose construction of the Smith Act is either rational or constitutional. Hitler, in his rise to power, and the defendants in the Sedition Trial, advocated a change in the government, but no evidence was offered that either Hitler and the Nazis or the defendants ever, in their political campaigns, appealed to the armed forces to mutiny, be insubordinate or refuse to do duty.

Mr. Rogge:

In Germany, the Nazi conspirators appealed to members of the armed forces and the police to be disloyal to the Weimar Republic. The Weimar Republic was the German republican form of government similar to ours.

Comment:

Strict construction or, indeed, any rational and constitutional construction of our laws against causing insubordination in the armed forces, will not allow of the loose use Rogge makes of terms like "loyalty" and "our republican form of government." The simple fact of the matter is that, under our Constitution, there is no law and there can be no law against advocating a change in our form of government, and that's that. The armed forces are sworn to obey the orders of those in command over them and, especially the latter, to uphold the Constitution. They are not sworn to resist or suppress any advocacy of a change in our form of government unless the making of the change is to take an illegal or violent form. The Constitution provides for lawful change and sets absolutely no limits on the extent or nature of that change. The only limitation as to change is that it shall be brought about in a manner provided for by the Constitution and the laws pursuant thereto.

In the case of Germany and the Nazis the consensus of authoritative opinion is that Hindenburg and most of the officers of the German army, whether on active service in the small professional army allowed Germany under the Treaty of Versailles or in civilian life, were not loyal to the principles or doctrines behind the Weimar Constitution. That is, they did not believe in those principles. They wished a change in the form of government. Most of them, including Hindenburg, the highest symbol of the German army, favored a restoration of the monarchy, which would have meant an abolition of the republican form of government. But this does not mean that these military leaders ever committed acts of disobedience of lawful orders, insubordination or mutiny under the Weimar Republic.

According to Rogge's theory or loose construction of the law against military insubordination, Hindenburg, the President of the German Republic and most of the Reichswehr generals were as disloyal to the German Republic as the Nazis; in fact, more so, since the Nazis planned to graft their desired system on to the Republic, whereas the monarchists had to abolish the Republic entirely in order to reinstate the monarchy. But the terms loyalty and insubordination must be strictly construed as regards men in the military service and laws against military insubordination. Only in 1945 the War Department of the United States announced that communists might be officers in our army. It refused to make the alleged communist beliefs of certain officers the subject of disciplinary action or dismissal.

There is no law in present-day America making it an offense for any one to favor a different form of government, or, to be quite concrete, to favor a communist or a Fascist form of government. In Germany a law was passed under the Weimar Republic making it an offense for a man in the military service to advocate a restoration of the monarchy. But that law could never, by the widest stretching of terms, have been applied to the Nazis. The Nazis undoubtedly came to power on a program which called for drastic change in the political institutions of Germany. But the consensus of authoritative opinion is that the Nazis came to power in a legal or constitutional manner and brought about their desired changes in German political institutions in a legal manner. No reasonable person would argue from the record that the Nazis seized power by an illegal or violent coup d'etat. Even Dr. Rauschning, the government's star witness in the Trial, said that the Nazi coming to power had been legal in form and had not been a coup d'etat. The only propaganda to members of our armed forces that would run afoul of the Smith Act would be propaganda advocating the violent overthrow of the government, mutiny or disobedience to orders and to the existing laws. All evidence as to propaganda, either of the Nazis or the defendants, which did not fit these particular and extremely specific advocacies, was irrelevant. Like the flowers that bloom in the spring, it had nothing to do with the case.

Mr. Rogge:

That was the one which the Nazi conspirators destroyed after they seized power in 1933. In this country, the Nazi conspirators and the defendants conspired to cause members of our armed forces to be disloyal to our form of government.

The emphasis on causing disloyalty among members of the armed forces resulted from the failure of the Munich Putsch of November 8, 1923. The Munich Putsch was an attempt by the Nazis forcibly to overthrow the government of one of the states in Germany, which failed because the Reichswehr and the police supported the existing constitutional representative form of government and fired on the Nazis. Prior to November 8, 1923 the Nazis thought in terms of a forcible overthrow of the Government.

The conspirator Hitler himself stated that from 1919 to 1923 he thought of no other method than a forcible overthrow of the government. But that failed, with the Munich Putsch of November 8, 1923, as I have stated.

The conspirator Hitler was sent to prison for high treason. While he was in prison and even during his trial, he began to revise the tactics to be used by the Nazi conspirators. While he was in prison he wrote the first volume of *"Mein Kampf,"* and shortly after his release by the short-sighted authorities who could not see in him any more than a crackpot, he wrote the second volume.

The new tactic of the Nazi conspirators, which the defendants in this case followed, consisted, as an integral part, in appealing to members of the armed forces to be disloyal to the existing democratic, representative form of government.

Comment:

This is an interpretation of Nazi history wholly in contradiction with all the authorities on the subject we have been able to read. The consensus is that, after the failure of the Beer Hall Putsch, Hitler decided that he could only succeed along the path of legality since the army could not be won over, even in part, to facilitate a violent overturn of the government. This is not to say that the Nazis, individually, did not commit many criminal acts in their campaign from 1923 to 1933. It is merely to say that their official policy was to win power in a legal way, and that the final steps to power were taken in strict accord with the constitutional and legal forms, thanks largely to Hindenburg. Of course, Rogge's thesis is that Hitler's winning over of Hindenburg and the German army constituted the offense described in the Smith Act and the indictment. That, however, is an interpretation which is not susceptible of proof, which is contrary to the standards of strict construction set by the courts for free speech cases under laws against propaganda advocating violence and insubordination, and which, as interpretation of Nazi history, runs counter to the practically unanimous consensus of authoritative opinion. To prove that it is no crime for a politician to appeal to the armed forces, even though the politician favors drastic political changes, we have only to cite the fact that during the Presidential campaign of 1944, Norman Thomas, the Socialist candidate for President, was given by the authorities as much time over the radio to talk to the men in the armed services overseas as the other candidates. Up to the Beer Hall Putsch, Hitler hoped to use with success the tactic charged in the indictment. Thereafter, he realized that tactic had no chance of success and scrupulously avoided trying it again. This was obviously a matter of political shrewdness rather than virtue. Nevertheless, this, according to all authorities, is the fact. And this fact knocks out Rogge's entire case in so far as the Nazis were concerned, whom Rogge tried along with the defendants. So, even if it had been true that the American defendants were planning to imitate the Nazis to the letter in the matter of coming to power in this country, it still would not have been true, by reason of such imitation, that the defendants were conspiring to cause insubordination in the armed forces, as charged in the indictment.

Mr. Rogge:

The conspirator Hitler already began to think of the new technique during his trial for high treason after the failure of the Munich Putsch. In his concluding speech at his trial he said, "One day the hour will come when the Reichswehr will stand at our side, officers and men."

Comment:

The point here is not one of clearing Hitler but of safeguarding freedom of speech in the United States. Hitler and his gang can be proved guilty of all sorts of acts of violence and illegality in their long struggle for power from the failure of the Beer Hall Putsch to Hitler's appointment as Chancellor of the Reich by President Hindenburg in Jauary 1933. But Hitler's campaign of propaganda and political proselytizing, aimed at winning over the German army from its venerable head, Field Marshal Hindenburg, down to the lowliest private in the Reichswehr, was about the most legal, proper, natural and democratic part of his political activities.

What would be the state of civil liberties in the United States or anywhere else if it were a crime to try to win over to a new political party members of the armed forces? If it were a crime to belittle government officials in office and ask for their replacement by others? If it were a crime to denounce existing institutions and ask for new ones?

The illegalities of Hitler's campaign for power consisted of acts and tactics which Rogge never mentioned, or only alluded to, such as acts of terrorism and intimidation by Nazi party members and Storm Troopers, aimed never at the armed forces but at civilian communists, Jews and Social Democrats. Had Rogge charged that Hitler and the Nazis used street fighting and gangsterism in their campaign, he would have been on sound ground, but it would have been impossible for him to link the words or deeds of his defendants with such tactics.

Hitler's bid for the support of the highest officers and humblest privates in the German armed forces was about the most lawful and proper political tactic Hitler ever used. Hitler certainly was not trying to induce Hindenburg to head a mutiny of the German Army against himself, Hindenburg, the then President of the German Republic.

Mr. Rogge:

After the unsuccessful Munich Putsch of November 8, 1923, the conspirator Hitler and his confederates, and the defendants after them, realized that a Nazi revolution could never succeed unless it had the support of the armed forces. They realized that they could not overthrow a democratic, representative form of government without first depriving it of the loyalty of the armed forces. The army was sworn to uphold the existing form of government. Accordingly, they must cause the army to be disloyal.

Comment:

The above statements are simply not true. The army is sworn to uphold the Constitution and to obey the lawful commands of duly appointed superiors. The army has no function to perpetuate the existing form of government or prevailing institutions. A soldier may be perfectly loyal within the existing standards of loyalty and yet believe in and advocate an entirely different form of government. The army does not owe loyalty to any particular form of government. It owes loyalty to the government, whatever the government's form. According to Rogge's theory, if the existing form of government changed, the soldier's oath of loyalty would be terminated. He would have to take a new oath.

Mr. Rogge:

Although the conspirator Hitler revised the tactics to be used by the Nazi conspirators, the objective remained the same—the overthrow of constitutional, representative government and the substitution of a Nazi dictatorship. The conspirator Hitler and his confederates, and the defendants after them and in conspiracy with them, were simply going to be more cautious in the way they brought this about. Instead of advocating violent overthrow, they were going to be more subtle. They were going to talk about the use of legal methods. They were going to exploit and abuse the rights and privileges, like freedom of speech and freedom of assembly, given them by a democratic, representative form of government, and they were going to cause the armed forces to be disloyal to that Government.

Once the Nazis in Germany had succeeded in disintegrating and softening the existing social structure, and taught the people to hate democratic, representative government, had taught the people to hate certain groups and classes, had destroyed the faith of the army in the existing form of government, then they, as an organized minority seized power. The Nazis and the defendants in this country, in conspiracy with them, intended to do the same thing here.

Comment:

Note Rogge's repetitions of the same theme. He is not stating what the evidence will show. He is arguing to the jury an interpretation of the Nazi advent to power that runs counter to all the authoritative literature on the subject.

Mr. Rogge:

According to the Nazi conspirators and the defendants, the old technique of street fighting and barricades, which were in existence at the time of the French Revolution, were outmoded. The new technique was to disintegrate and soften up the existing social structure, and then a strong organized minority, with the support of at least a section of the armed forces, simply took over.

Not only did the Nazis and the defendants in conspiracy with them abuse and exploit the rights and privileges granted by a democratic, representative form of government, but they told us that there was nothing that a democratic form of government could do about it. They told us that they were only exercising the rights of freedom of speech and of assembly which such a form of government gave them. The conspirator Goebbels said that it would always remain one of the best jokes on the democratic system that it provided its deadly enemies with the means of destroying it.

The Weimar Republic, the German constitutional, representative form of government, was too weak to withstand the assaults upon it by the Nazis. The powerful weapons of mass propaganda and terrorism developed by the Nazis worked only too well in a world unprepared at the time to meet them.

Comment:

The consensus of authoritative opinion interpreting the events of this period in Germany is that the Nazis were not the cause but the consequence of the weakness of the Weimar Republic. Nothing in the way of laws or criminal prosecutions such as Rogge attempted can save any regime that lacks the confidence and support of a majority of its ablest and strongest leaders, a lack from which the Weimar Republic suffered. The officers of the German army, the leaders of the right and center in Germany, with some exceptions, simply were not believers in the Republican form of government, Hitler did not create the situation. He exploited it. Wherever and whenever it exists, someone and some group will doubtless exploit it. Exploitation of such a situation, where the situation exists, cannot be prevented. The thing to prevent is the situation. The republican form of government must rest on the consent and support of the people. If it lacks that basis, it cannot be preserved by Rogge's methods or by the activities of a police state.

A police state which aims to repress all forms of political propaganda and advocacy opposed to the existing form of government, simply is not a republican form of government such as the Weimar Republic or the American Republic is supposed to be. Soviet Russia is an example of a state which protects itself as Rogge assumes American laws, particularly the Act of June 28, 1940, are intended to protect the American form of government. Under our theory the only protection the people need against ideas is the exercise of their individual judgments in the free market of ideas.

If, as happened in the case of the Weimar Republic, the judgment of the people in the free market of ideas does not afford protection to the existing form of government, it is doomed. A free society under a republican form of government cannot be preserved by the methods of a totalitarian police state. Once the police state formula is put into operation, there is, ipso facto, an end of a free society under the republican form of government. We cannot have the protective prevention of the Soviet State and the freedom of the American system at the same time.

Mr. Rogge:

By 1933, the Nazis had succeeded in so disrupting the operations of the Weimar Republic that President von Hindenburg was compelled to appoint Hitler as Chancellor.

Comment:

As already shown by citations from authorities, the consensus is against this statement. Certainly, it is a proposition which the evidence could not show. It is purely an opinion or interpretation of history. And it is one not shared by any outstanding authorities on the period and events in question. As for the disruption of the Weimar Republic, most authorities blame this condition on the weaknesses and vices of the German party leaders and military leaders and on their rivalries, rather than on the propaganda of the Nazis. The Nazis merely took advantage of those weaknesses and rivalries. And the decisive factor was the fact that Hindenburg drew the conclusion from these conditions that Hitler was the man to save the situation. Hitler did not assist Hindenburg to that conclusion by advocating insubordination in the armed forces of Germany.

Rogge assumed that Nazism might have been prevented from coming to power and the Weimar Republic preserved if only Germany had had a few such prosecutions as he attempted. The weight of informed opinion is against any such assumption. In this book we are not arguing in favor of any one interpretation of the Nazi rise to power. We are merely insisting that Rogge's interpretation has no support among authorities on the subject and that, even if it had, it would still not be susceptible of proof, being essentially a matter of opinion and not a justiciable issue of fact.

Mr. Rogge:

Once that happened, the Nazis destroyed the Weimar constitution.

Comment:

This is not true. The Nazis suspended as much of the Weimar Constitution as hampered the fulfillment of their program. All this they did in a perfectly constitutional way as provided by the Weimar Constitution. They used Article 48, which gave the President the power to declare a state of emergency under which the seven bill of rights articles of the Constitution were suspended for the duration of the emergency. The Nazis never ended the state of emergency. Undoubtedly, the Nazis violated the spirit of the Weimar Constitution, but they observed the letter of the law.

Another article of the German Constitution which was most useful to the Nazis was one providing that the German Reichstag could pass a law called an enabling act authorizing the Chancellor and his Cabinet to decree laws which would have the same effect as laws passed by the

German legislative body. This power was only granted for a supposedly limited period. But that period could be indefinitely extended without violating the letter of the law. The Nazis lost no time getting the Reichstag to pass such an enabling act to legalize legislation by fiat of the Fuehrer. It was all done within the framework of the German Constitution.

The point of raising these fundamental objections to Rogge's thesis is not so much to add further proof of its untenability as to show that the defendants could not possibly have followed or planned to follow the Nazi pattern. The United States Constitution contains neither an Article 48 nor any provision authorizing the enactment of an enabling act by virtue of which the President and Cabinet could issue decrees having the force of laws. Our President, for example, cannot declare a state of emergency and suspend the Bill of Rights. It may be noted, however, that from 1941 to 1945 there issued presidential directives having all the force of laws passed by Congress at an average rate of 152 per day!

Of course, a political party bent on changing our political system which was as successful in gaining the collaboration of political leaders and in winning mass support as were the Nazis in Germany in 1933, could quite well, in this or any other country governed as ours is, bring about the complete liquidation of our present institutional pattern in a perfectly constitutional and legal manner. But they could not do it in the same way the Nazis did it in Germany. What protection have we against such a thing happening? The answer is, none, whatsoever, except ourselves. Any attempt to protect people against themselves by means of laws and powers for government must be an attempt to end that people's freedom. Rogge's prosecution theory was that the Act of June 28, 1940 gave the Department of Justice power to protect the American people against themselves by deciding for them what political propaganda was fit for them and what propaganda was unfit. And so we get back to the central issue of a free society as against a police state.

Mr. Rogge:

They formed a secret police, the Gestapo; they abrogated the rights of freedom of speech, freedom of the press, freedom of assembly, freedom from arrest without cause, and all the other civil liberties guaranteed by the Weimar Constitution.

Comment:

Rogge failed to say that the Nazis did all these things pursuant to authority of Presidential decrees in accordance with Article 48 of the Weimar Constitution which reads as follows:

> If the public safety and order in the German Reich are seriously disturbed or endangered, the national President may take the measures necessary for the restoration of public safety and order, and may intervene if necessary with the assistance of the armed forces. For this purpose he may temporarily set aside in whole or in part, the fundamental rights established in Articles 114 [freedom of the person], 115 [inviolability of the home], 117 [secrecy of correspondence], 118 [freedom of speech], 123 [right of assembly], 124 [freedom of association], and 153 [property rights—no expropriation without due process and due compensation].
>
> The national President must immediately inform the Reichstag of all measures taken in conformity with paragraph 1 or paragraph 2 of the Article. The measures are to be revoked upon the demand of the Reichstag.

When Rogge put on an expert witness to testify to the enactment of the special decree of President Hindenburg on February 28, 1933, the day after the Reichstag Fire, suspending civil liberties, he thought he had laid another plank in the platform of his case against the defendants, who were charged with having planned to do the same thing in the United States. Cross-examination of this witness by defendant Dennis, who had all the German laws in question and numerous learned articles about them at his finger's tips in the courtroom, brought out from the witness that this action was in entire accord with Article 48, which Dennis then had identified for future use as a defense exhibit. Dennis also made this witness testify that the same action of suspending civil liberties during an emergency had been taken by the Socialist President Ebert against the communists during a period of considerable disorder in 1920. Dennis also brought out that no such action could be taken in the United States as our Constitution has no counterpart of Article 48 of the Weimar Constitution. The same point was again made, on cross-examination by Dennis, in respect to the Enabling Act of March 24, 1933, which Hitler obtained from a new Reichstag in which the Nazis still had not a clear majority, giving the Reichs Chancellor under Hindenburg virtual power of unlimited legislation by means of cabinet decrees for the duration of the emergency. At the next Reichstag election, Hitler got an overwhelming majority.

Now, of course, all this evidence about Nazi legislative and executive happenings had nothing to do with proper proof of a criminal charge of conspiring to cause insubordination in the armed forces. But the judge allowed Rogge to argue his case along these lines and to put in whatever evidence he chose in support of his historical thesis. So Dennis had no choice but meet the government's historical thesis on the field of history, which, as the reader may well imagine, is a rather broad field. The effect of Rogge's assertions about these examples of Nazi measures to obtain dictatorial powers, coupled with the charge that the defendants were conspiring to do the same thing in America, and duly supported by German legal documents translated and expounded by a German legal expert with a thick German accent, would have been disastrous with an average jury as against the defendants had Dennis not been able forthwith, on cross-examination, to bring out the utter irrelevancy of this evidence both to the charge and to any plan Americans might have formed or pursued for this country.

This is just another one of many concrete examples of the gross unfairness of the prosecution theory and of how dangerous it might have proved against an inadequate defense. The government's case consisted essentially of selected bits of history, about which no one in the court except the witness for the government was supposed to know anything or say anything. These selected bits of history had been pieced together to prove an absurd series of allegations. An adequate defense had to complete the historical picture wherever the government introduced only a single bit of historical data. Doing this for the defense helped to make the trial farcical, unreal and most unlike a criminal trial. The defense did not do this out of perversity but grim necessity in order to avert the possibility of a shocking miscarriage of justice.

Mr. Rogge:

They abolished representative government. They prohibited all political parties other than the Nazi Party, and they proclaimed the Nazi Party as the State.

For a long time our Government had no statute under which it could meet the challenge of the Nazis and the defendants. We did have a statute prohibiting a violent overthrow of the Government, but the defendants denied that they were trying to bring about a violent overthrow of the Government. On the contrary, they declared that they were being patriotic and Christian.

In June, 1940, however, our Congress passed an Act, which became a law on June 28, 1940, making it unlawful for any person, with intent to interfere with the loyalty of our armed forces, to advise, counsel, or urge disloyalty by members of our armed forces, or to distribute or cause to be distributed written or printed material advising, counseling or urging insubordination.

Comment:

Still no promise of evidence relevant to the charge just repeated! Periodically, throughout his opening statement, Rogge would refer to the law and the charge in the indictment and then go off again on a tangent of argument and interpretation revolving around the Nazi movement in Germany.

CHAPTER X.

PROSECUTOR'S OPENING STATEMENT (Continued).

Mr. Rogge (Continuing his opening statement):

Just before the recess, I had mentioned, in June 1940, Congress passed the Act of June 28, 1940 which made it unlawful for any person to cause disloyalty. The same act also made it a crime to conspire to do that, and the indictment in this case, as I have already stated, charges that the defendants conspired with each other and with officials of the German Government and with leaders of the Nazi Party in Germany to cause disloyalty among members of our armed forces in violation of that Act of June 28, 1940.

Conspiring to interfere with the loyalty of the members of our armed forces to our form of government in order to bring about a Nazi form of government in this country may not have been a crime before June 28, 1940, but it was a crime after that date.

Up until the time defendants violated this statute, they may have been free to use their new Nazi technique to further their attempt to overthrow the Government of the United States. Freedom of speech is one of the great rights protected by the Constitution. But when the defendants conspired, as part of their Nazi technique, to impair the loyalty of our armed forces, their words became acts against the United States.

Comment:

The reasoning in the preceding three paragraphs is symptomatic of Rogge's twisted legal theory. If the defendants conspired to cause insubordination in the armed forces, that was a crime. If they conspired to cause disloyalty in the sense of refusal of duty, mutiny, disobedience of orders or some other recognized military offense, that was a crime. But if the defendants had belonged to one group, which they did not, devoted to persuading all Americans, including members of the armed forces, that our form of government should be replaced by another as our present form of government and institutions were all wrong, that would have been no crime, unless the group wished to bring about the change by means of violent overthrow of the government or mutiny of the armed forces. Rogge's repeated use of some formula like "loyalty of the members of our armed forces to our form of government" is the key to the basic fallacy of his case. Any one who advocates a change in the form of our government can be deemed to be impairing the loyalty of our armed forces to our present form of government. Such an interpretation of the Act of June 28, 1940 is nonsensical as well as unconstitutional and contrary to the rule laid down by the Court of Appeals in the Dunne case, already extensively discussed, in sustaining a conviction of conspiracy to violate this law.

Rogge said in court during arguments over the indictment that the things the defendants said would have been lawful and proper if said by others with pure motives, or without a Nazi motive. These utterances, he contended were criminal only because uttered by persons in a Nazi conspiracy and animated by a Nazi evil motive. In other words, according to Rogge, there is one law governing utterance for the good non-Nazis and another law for the bad Nazis. Granting, as, of course, we cannot, the validity of such a rule, Rogge would still have been stumped to make out a case that the defendants were Nazis. To meet this difficulty, his reasoning ran somewhat as follows:

How do we know the utterances of the defendants violated the law? Answer: By the fact that they are Nazis or co-conspirators of the Nazis. How do we know that the defendants were Nazis or co-conspirators of the Nazis? Answer: By the nature of their utterances. This is a perfect example of one of the most elementary and egregious faults in reasoning known to formal logic. It is called reasoning in a circle or begging the question. Now it takes no such reasoning to prove that utterances are criminal or that given individuals are Nazis. Such reasoning cannot prove anything except that the person thus reasoning is either a knave or a fool. Proving that the defendants conspired to cause insubordination would not prove that they were Nazis. Proving that the defendants were Nazis would not prove that they conspired to cause insubordination. Rogge could not prove either that the defendants conspired to cause insubordination or that they were Nazis. To prove that the defendants conspired to cause insubordination, Rogge asserted that the defendants were Nazis. To prove that the defendants were Nazis, Rogge asserted that the defendants conspired to cause insubordination. To prove that the defendants conspired to cause insubordination, it was not necessary to prove that they were Nazis. It was only necessary to show acts and utterances on the part of the defendants indicating intent to cause insubordination. This Rogge never even attempted to do. Instead, he talked endlessly about the history of the Nazi movement, most of his talk running counter to the consensus of authoritative opinion or interpretation.

Defense objections to Rogge's evidence took mainly the form of an altercation which can be reduced to the following simple questions and answers: Why introduce this piece of writing, this book, pamphlet or letter? Answer: Because it is Nazi in character. Why is it Nazi in character? Answer: Because the person responsible for it was a Nazi. Why do you say that he was a Nazi? Answer: Because he was responsible for this book or pamphlet. Why is this piece of writing or printed matter Nazi? Answer: Because it has to do with undermining the morale of the armed forces. Why does it have to do with undermining the morale of the armed forces? Answer: Because it is Nazi. Obviously, the answer to the question, what has this piece of paper to do with causing insubordination in the armed forces, is not to say: It is Nazi. The answer, if there was a well founded affirmative answer, would be implicit in the nature of the things said in the piece of paper.

Even if all Rogge said about the Nazis being in a world conspiracy to cause insubordination in the armed forces had been true, and if his charge that the defendants were in that conspiracy had also been true, it still would have been wholly superfluous for him to talk so much about Nazi history and practices. To prove his case, he would only have had to show by analysis of the defendants' utterances and acts, or by a mere presentation of the bare facts of such utterances and acts, that these utterances and acts were made with intent to cause insubordination. If such utterances and acts had had that intent, or been done with that intent, this fact would have been self-evident from the nature of the utterances and acts. It might take expert analysis to show that a given preacher's sermon was good Unitarian or good Trinitarian doctrine. But it takes no expert to tell a jury whether given words or acts constitute incitement, advice, counsel or exhortation to the armed forces to be insubordinate.

Mr. Rogge:

No more than the most stringent protection of free speech would protect a man in falsely shouting "fire" in a crowded theater in order to cause a panic would the Constitution guarantee the right to abuse such freedom in impairing the loyalty of our armed forces.

The Court (interposing):

Just a moment, Mr. Rogge: The Court admonishes you to confine your opening statement to a statement as to what the evidence will show and avoid argument.

Comment:

The Court was in order in admonishing Rogge for argument. But, as the reader can see for himself, most of Rogge's opening statement was just that and nothing else. Rogge, in this instance, happened to be entirely correct in his argument or explanation of the law to the jury. But it called for a further admonition by the Court that the obvious way to show that the defendants had abused freedom of speech by impairing the loyalty of our armed forces would be to promise evidence of utterances and acts which did just that in the way charged. In the words of Hamlet, the court might have said to Rogge: "More matter, with less art!"

Mr. Rogge:

The evidence will show that after the Nazis seized power in Germany in 1933, and destroyed the Weimar Republic, they became more active in spreading Nazism throughout the world. They tried to promote the establishment of Nazi forms of government in England, in France, in the United States, and in other countries which had democratic, representative systems of government. They intended and attempted to spread Nazism in the same way that they had done it in Germany, by a systematic mass propaganda campaign designed to undermine the faith of the people in their leaders and in their form of government and to impair the loyalty of members of the armed forces.

Comment:

Rogge's statement that the evidence would show all the propositions advanced in the above paragraph is absurd. It would be absurd even if all these propositions were true, which, of course, they were not. It would be absurd because of the sheer mass of evidence required to support such broad and world embracing historical propositions. We stress this point because the impression prevails that the Trial was turned into a farce by the perverse behavior of the defendants and their counsel, when, as a matter of fact, what did most to make a farce of the Trial was the utterly impossible nature of the government's undertaking to prove a long series of historical allegations, any one of which would have taken weeks of massing of historical data merely to support for the purposes of a historical debate. In the paragraph last quoted, Rogge undertook to show by evidence what the Nazis, according to him and contrary to the general consensus, had been trying over a period of years to do all over the globe. Even if his allegations had been entirely correct, it would have taken months and months to sustain them with evidence against defense objections and cross-examination.

Rogge could easily show by evidence that the Nazis had carried on propaganda all over the world. That was done by all governments and foreign agents. But proving that Nazi propaganda had been carried on with a view to setting up Nazi forms of government everywhere by means of troop mutinies or armed revolts was a preposterous undertaking. When Edmund Burke said on the floor of the British Parliament during the American Revolution that he did not quite see how one could indict an entire people, he doubtless had in mind certain obviously quantitative aspects of drafting such an indictment. Proving what Nazi agents did or were trying to do through propaganda all over the world was too large an order for any trial by jury. As already stated, the consensus of the authorities is that the Nazis were not trying to introduce Nazism all over the world at all. Certainly, the assertion that such was their intent and program of action was an interpretation of what actually happened that no rational man could expect to prove against opposition, the ruling opinion interpreting the facts and the known facts being what they are. But, as already indicated, Rogge doubtless conceived his historical thesis in the easy confidence it would not be contested by the defense.

Mr. Rogge:

As the Nazi conspiracy grew, and even before the Nazis seized power in Germany in 1933—the evidence will show that the Nazi Party set up branches in most of the countries of Europe, in South America, and in the United States. These branches, called ''Gaus'' or ''cells'', disseminated propaganda, and Party members preached Nazism. By May 1931 the Nazi Party had so many members and branches outside of Germany that the Nazi conspirators established a Party office for these branches. In 1934 the name of this Party office was changed to Foreign Organization of the Nazi Party. The head of this organization is the conspirator Bohle. The Foreign Organization of the Nazi Party is divided into eight regional departments. Department 6 has jurisdiction over North America. Other departments have jurisdiction over other parts of the world.

Comment:

Here the quantitative factor comes up again. Rogge was not only trying the thirty defendants, but the entire Nazi Party and the German Government. He was not only trying Nazism, as a system of ideas and doctrines, but a whole series of its agencies and instrumentalities. The authors of this book do not raise the question whether the Nazis and their myriad agencies and instrumentalities, their thousands of leaders and agents, did wrong or what wrongs they did. We merely point out that when a prosecutor undertakes to show by evidence what so many people did all over the planet by way of carrying out a world conspiracy and plan, his undertaking is absurdly impossible of accomplishment in any court trial. Such a task is one for historians and scholars. And it is certain that they will never be agreed as to most of their conclusions.

We do not question for one moment that the Nazis and Nazi agencies and instrumentalities could be shown by evidence to have done a great deal that was wrong, unlawful and shocking to American sensibilities, all by way of serving German and Nazi interests. But if Nazi leaders or agents did anything to cause insubordination in the American armed forces, or so conspired with the defendants, it would not be necessary to postulate and to try to prove a whole series of propositions about the organization, purposes and activities of sundry Nazi organizations, agencies and personalities in order to prove the commission of this particular crime, either by individual Nazis or the defendants.

Mr. Rogge:

After the Nazi conspirators seized power in Germany in 1933, the evidence will show that the Nazis established a Ministry of Public Enlightenment and Propaganda under the conspirator Goebbels. The Propaganda Ministry was likewise set up on a world-wide scale. Section 7 of the Propaganda Ministry was divided into twelve regional subsections to cover the whole world. German organizations which had been in existence prior to 1933 with branches and contacts throughout the world were reorganized or *gleichgeschaltet,* as the Germans called it, and used by the Nazis to disseminate Nazi propaganda.

You will hear of a number of these organizations during the course of the trial. At this point I think I should mention at least four of them: two of them specializing in disseminating Nazism among Germans and persons of German origin in other countries and two that specialized in disseminating Nazism among native groups. The two which specialized in spreading Nazism among Germans and persons of German origin are the League for Germandom Abroad and the German Foreign Institute. The two that specialized in disseminating Nazi propaganda among native groups are the Fichte Bund and World Service, or Welt Dienst as it is called in Germany.

Comment:

The authors of this book offer no interpretation of their own of the functions, purposes or activities of these German organizations just named by the prosecutor. They merely point out that the interpretation of the prosecutor of or about so many different Nazi organizations, agencies and activities could not possibly be proved, even if true, within the framework of trial by jury. All of these allegations raised all sorts of collateral issues of fact as well as certain main issues on which certain defendants joined to challenge the prosecution. Rogge probably expected that the conspiracy would be admitted and that certain defendants would plead guilty, the rest merely denying that they participated in it.

Mr. Rogge:

The Nazis planned to have the German groups in the United States act as the spearhead of the Nazi movement and to combine with native groups to form a Nazi or Fascist form of government in this country.

The Nazis did not expect to convince native Americans that the German element should control the country. They did, however, want to convince native Americans that America should have the same form of government that Germany has and should abolish the democratic, representative form of government, a form of government which the Nazis wanted to destroy throughout the world.

The movement in this country did not start all at once nor did it start with any one group. The very nature of the Nazi program was to win converts from different groups. The conspirator Hitler's method was to win over those who were dissatisfied for various reasons. To those who thought they had grievances, to the malcontents, the demagogues, the Quislings, the opportunists, and to those who thought they could further their own ends by destroying our form of government, Hitler made an appeal. Hitler knew and Hitler stated that in every country he would find persons who would join the world-wide Nazi conspiracy to overthrow democratic, representative forms of government such as ours.

The twenty-nine defendants in this case joined the world-wide Nazi conspiracy. The evidence will show that they studied, elaborated on, intended to follow and in fact did follow, the Nazi technique for overthrowing a democratic, representative form of government. As a part of the pre-revolutionary phase of their planned Nazism in this country, the defendants tried to teach people to hate our form of government, to hate various groups and classes, they tried to spread anti-Semitism and prejudice against the

Negro, they tried to make us believe that a minority group was to blame for all the evils in the world, including the war, and for all the hardships to which a government must necessarily subject its people in time of war, and they tried to cause the members of our armed forces to be disloyal.

The evidence will show that by the use of these tactics the Nazis and the defendants in conspiracy with them hoped to soften and disintegrate our social structure, accustom us to the use of terror and force, destroy our feeling for law and order, impair our faith in our form of government, dishearten, confuse and divide us, dilute our strength, the strength of a free people, make us distrustful and apathetic, so that we would be unwilling to defend our institutions, and cause members of our armed forces to be disloyal, and then the defendants and their followers as an organized minority intended, with the support of a section of the Army, to seize control in this country and institute Nazism.

The German group in this country which the Nazis primarily used was the German-American Bund. Five of the defendants on trial before you were members of the Bund and if the Court please, I should like to have these defendants arise for identification as I refer to them so that the jury may see the persons about whom I am talking. They will be identified too.

Those five defendants, and they will be identified for you during the course of the trial, are Gerhard Wilhelm Kunze, August Klapprott, Herman Max Schwinn, Hans Diebel and Franz K. Ferenz.

The evidence will show that the Nazis used the Bund to spread Nazism not only among Germans and persons of German origin but also among native Americans. The evidence will further show that the other defendants in this case cooperated with the Bund in the spread of Nazism.

Comment:

Prosecutor Rogge attached the greatest possible importance to the German-American Bund as the mainstay of his case. He had put five German-Americans, all in custody, three serving sentences for counseling evasion of the Selective Service Act of 1940, into the Sedition Trial in order to give it what counsel Dilling, representing Mrs. Dilling, called "the sauerkraut flavor." The three Bund officials serving sentences during the trial had these sentences set aside by the United States Supreme Court, as being unwarranted by the evidence—this reversal coming over six months after the end of the Sedition Trial. Rogge, on July 13, 1944, (Record 6,588), after the trial had been going for nearly three months, in attempting to reply to a query from the Court as to when some real evidence of criminal intent might be expected, said:

> I think the evidence that we have already introduced has shown that the Bund was the spearhead of the Nazi movement in this country; that the evidence that is already in shows many of the defendants collaborated with the Bund. There will be further evidence to show that it was an integral part of the Nazi revolution to appeal to members of the armed forces to be disloyal to the existing democratic republican form of government; it was an integral part. There is further evidence in this case which we contend shows that. You had the witness Gissibl, who testified that the Bund in sending out its propaganda did not limit it to civilians; it went to soldiers and civilians alike. [The Bund, of course, had members in the armed forces as any large organization of male members naturally would have.]

Now the authors of this book wish to make it clear, again and again, that they do not propose either to defend or explain the German-American Bund, or any other group or organization named in the indictment. We have neither the facts nor the desire to judge the twenty-nine defendants, the thirty-five organizations and the forty-two publications named in the indictment as co-conspirators or instrumentalities of Hitler. We only remark that all the evidence presented against the Bund in the Sedition Trial failed to prove anything of an illegal character. It only proved a series of well known facts about the Bund such as that: its members were all persons of German origin who were also pro-German, pro-Hitler, and pro-Nazi before Pearl Harbor; that they wanted to keep American foreign policy neutral and America out of the war; that they felt friendly to all Americans who also favored American nonintervention in the war; that they were hostile to all interventionists; that they became involved in Hitler's feud with the Jews, having come under attack and economic boycott by the Jews in this country by reason of the Bund's pro-Hitler attitude. It was not difficult to link the Bund with Nazi Germany. But such evidence in no way sustained the charge of the indictment.

The observations we have just made about the government's showing against the Bund are substantially the same as the comments or findings of the United States Supreme Court setting aside, for want of evidence, the conviction of twenty-four Bund members, three of whom, Wilhelm Kunze, August Klaprott and Herman Max Schwinn, were defendants in the Sedition Trial. (See *Keegan* v. *U.S., Kunze* et al. v. *U.S.* Nos. 39, 44, October Term 1944. Decision rendered on June 11, 1945; 89 Lawyers Edition No. 17, page 1314). Had this Supreme Court decision been available during the Sedition Trial, defense counsel could have used it to refute and discredit a large part of Rogge's opening statement and prosecution case. For instance, the Supreme Court there said:

> If the Bund and its membership were prior or subsequent to January 1, 1940 engaged in illegal activities other than those claimed to be proved in the indictment, the record is bare of evidence of any such.

The twenty-four Bund members had been convicted in a wave of war hysteria on a charge of violating the Selective Service Act of 1940 by counseling Bund members to refuse to do military duty. The Supreme Court found the evidence insufficient to sustain the conviction. Yet, in that case, the evidence in support of the charge was far more substantial than anything tendered in the seven months of the Sedition Trial. The evidence consisted of Bund command No. 37, allegedly issued by defendant Kunze, which stated:

> Every man, if he can (or, as the Bund translator insisted and the Supreme Court agreed, "if he properly can") will refuse to do military duty until this law and all other laws of the country or the states which restrict the citizenship rights of Bund members are revoked!

But the Supreme Court said:

> We think the evidence insufficient to overcome the innocent purport of command No. 37, and to fasten on those who imparted that command a covert purpose knowingly to counsel evasion of military service.

In the Sedition Trial Bund command 37 was also introduced. It was considered by defense counsel as about the worst piece of evidence against the defendants put in during the course of the entire trial since, unlike the rest of the evidence, it did relate to military service.

Even if the Supreme Court decision had gone against the twenty-four Bundists, three of whom had been added to the indictment to flavor it, Rogge's exploitation of the German-American Bund in the Sedition Trial would have still remained unwarranted by the nature of the evidence against the Bund and the score of native American defendants who had had no connection whatsoever with the Bund.

To link the defendants with Nazi Germany, the government relied heavily on the five alleged ex-Bundists and George Sylvester Viereck, an American of German birth, whose son was killed in action in Italy in the American Army during the first month of the trial and who, as a professional writer and publicist, had been in the service and pay of the German Library of Information in New York, of a German newspaper and of other German principals in his professional capacity. There could be no question about the link between Nazi Germany and the Bund or Viereck. But there was no evidence to show that either had ever tried to cause insubordination in the armed forces.

Having in the Bund and in the professional services of Viereck to German principals a series of links, though apparently quite lawful, with Nazi Germany, Rogge assumed he had only to establish a link between the non-German defendants and these two admittedly pro-German defendants. To do this, Rogge showed that certain non-German defendants had attended or addressed meetings of the Bund; that the writings of others had been sold in Bund bookshops or recommended by the Bund to its members; or merely that a Bund publication had quoted from one of the defendants. Thus, the only evidence presented against Lawrence Dennis in over seven months of the Trial was the introduction of seven extracts from a Bund newspaper, in which extracts there were quotations, seven in number, from his writings over a period of years. Some of these writings were articles of Dennis which had appeared in *The American Mercury.* Others were passages from his book, *The Dynamics of War and Revolution* and his *Weekly Foreign Letter,* both named in the indictment. It was testified by the government witness identifying these issues of the Bund paper, a former member and official of the Bund, that the Bund newspaper had made these quotations without the knowledge or consent of Dennis or *The American Mercury,* that this witness had not known Dennis and knew of no Bund member who had ever known Dennis. It was further brought out that the Bund paper in question quoted regularly and extensively from all sorts of publications and writers, many being anti-Nazi.

Mr. Rogge:

A group of Nazis who were members of Hitler's party in Germany started the Bund back in 1923. They carried on in this country the ideology of the Nazis and their object was to aid Hitler. For a while the name of the organization was "Friends of the Hitler Movement," the movement that had and has as its objective the destruction throughout the world of democratic, representative forms of government.

Comment:

More history. More interpretation of past events, activities and motives. More mere opinion, about too many people, too many subjects and too long a period of time to be susceptible of proof in a trial by jury. Assuming Rogge was correct about the objectives of the Friends of the Hitler Movement, just how could he have proved it in the face of official denial by that organization's spokesmen and literature? He said the evidence would show it. What evidence? How much evidence? And, even if this assertion could have been proved eventually by evidence, why was such proof necessary to show that the defendants conspired to cause insubordination in the armed forces? These statements about the Friends of the Hitler Movement might have been true and the defendants innocent. These statements might have been false, and the defendants might have been guilty. Their guilt or innocence turned on whether their words and acts showed the requisite intent, not on the intent or guilt or innocence of the Friends of the Hitler Movement.

Mr. Rogge:

Until the conspirator Hitler came to power in Germany in 1933 the Bund had no official recognition from the German Government, since it was opposed to that government. But after the Nazis came to power in Germany, the Bund in this country had direct relationship with the German Embassy and consulates in this country.

The Bund followed almost exactly the pattern of the Nazi Party in Germany.

Comment:

How ridiculous and untrue is the last statement. In Germany the Nazi Party ran candidates for public office. It had a representation in the national legislature. In political campaigns it played an active role. It specialized in street fighting and in beating up Jews and communists. No evidence of any activity of that nature was brought against the German-American Bund. The Bund was more nearly like a fraternal organization than a political party in this country. What the Bund might have done in the United States, if opportunities had presented themselves, no one can say. Certainly, it did not run candidates for public office or actively or publicly participate in political campaigns in favor of any candidate or party. Therefore, how untrue to say that it "followed exactly the pattern of the Nazi Party in Germany."

Mr. Rogge:

Just as the conspirator Hitler had divided Germany into districts and units and cells in which members of the Nazi Party carried on their activities, the Bund divided the United States into districts and units and cells.

Comment:

Having absolutely no evidence that the Bund did anything fundamental that the Nazi Party did in Germany, Rogge offered evidence that the Bund divided its territory into zones just as Hitler and the Nazis had done in Germany. What national or nation-wide organization, be it a religious domination, a fraternal order, or a big company, does not divide its territory into districts? Hitler divided Germany into districts. The Bund divided America into districts. And the National Biscuit Company or the Standard Oil Company of New Jersey divides America into districts. So what? For Rogge that was evidence that the Bund was following the Nazi pattern.

Mr. Rogge:

The Bund divided the country into three main districts, the Eastern District which they called in their German language "Gau Ost," the Middle Western, which they called in their German language "Gau Mittel West," and the Western, or "Gau West." During the period of this conspiracy, after the passage of the Act of June 28, 1940, the defendant Gerhard Wilhelm Kunze was the leader of the Bund for the whole United States, or "Bundesfuehrer," as they called it; the defendant August Klapprott was the leader of the Eastern District; and the defendant Herman M. Schwinn was the leader of the Western District.

Comment:

So what?

Mr. Rogge:

Prior to the time that the defendant Kunze was Bundesfuehrer, he was for many years the propaganda leader of the Bund. He had contacts with numerous of the defendants.

Just as the Nazi Party in Germany had an official propaganda organ, the *Voelkischer Beobachter*, so the Bund had an official newspaper called the *Deutscher Weckruf und Beobachter*. Later, as I have told you, it was called the *Free American* and *Deutscher Weckruf und Beobachter*. During the period of this conspiracy, the defendant, Klapprott was the editor of the *Weckruf*.

Propaganda was a very important part of the Bund's activities and they not only had their own paper, the *Weckruf*, but they also had book stores in which they sold propaganda from all over the world.

Comment:

Again, so what? Is not making propaganda a part of every organization's activities? Is it not normal for political, fraternal, religious, trade, labor and all or most other groups to have a newspaper, official publications, bookstores and propaganda media? One might as well say that the Bund had a secretary and treasurer or a letterhead.

Mr. Rogge:

Among the cities where they had stores were New York, Chicago and Los Angeles. The principal book store was in Los Angeles and was called the Aryan Bookstore. This store was in the district of which the defendant Schwinn was leader, and was under the direct supervision of the defendant Diebel.

Comment:

All the jury wants to know is the name and text of one book or pamphlet they sold advising or urging members of the armed forces to be insubordinate. Rogge says that is not necessary. According to him, he has only to show that the defendants sold or distributed Nazi literature, for, by definition (but not proof) all such propaganda violates the law against causing insubordination. When asked when or where any Nazi literature or agency ever caused a troop mutiny, Rogge merely repeats his definition. Asking when a Nazi ever caused insubordination in the army is like asking when a graduate of an approved medical school ever turned Christian Scientist.

Mr. Rogge:

The Aryan Bookstore was probably the largest distributor of Nazi propaganda in the United States. Large quantities of propaganda were brought over to this country from Germany on ships and delivered directly to the Bund in New York and Los Angeles. As more and more natives were won over to the Nazis, the literature of these Americans was distributed by the Aryan Bookstore and by the Bund throughout the country.

The propaganda which the Nazis in Germany sent over to this country for native consumption was naturally printed in English. The defendant Diebel wrote some of the Nazi conspirators in Germany and told them to leave off the words "printed in Germany" on this propaganda. The evidence will show that he said the Americans would fall for anything that was made in this country but they would be suspicious of anything that came from Germany.

The defendant Diebel's letter illustrates one of the fundamental propaganda techniques which the Nazis used in this country, namely, to take ideas which were actually made in Germany and attempt to deceive the American people by putting upon them the label "Made in America." We are going to show you that large quantities of propaganda came from Germany, that the defendants in this case received it and distributed it, but that is not the type of propaganda which we especially have to fear. The defendant Diebel and the Bund recognized this and they set about to fool the American people. The propaganda that did most of the damage and the propaganda that was used to create disloyalty among the members of the armed forces was the propaganda put out by these American defendants with the "Made in America" label.

Comment:

Rogge says "The propaganda that did most of the damage." Fine. Why doesn't he promise evidence to show the damage it did?

Mr. Rogge:

The Government will show you that the publications of the defendants in this case, Winrod, Dilling, Hudson, Deatherage, McWilliams, Edmondson, True, Sage, Lyman, Alderman and all the other defendants, and the defendant Smythe and all the others, while made in America and printed in America was actually Nazi propaganda put out to destroy the American form of government.

Comment:

Evidence could not possibly show that such publications were "actually Nazi propaganda." Any such statement must rest on an interpretation, an inference or a theory. The defendants denied it was Nazi propaganda. The literature, itself, denied it. A conclusion that it was Nazi propaganda based on analysis of the content and certain similarities with Nazi propaganda is not proper proof by circumstantial evidence; the opposite conclusion is equally consistent with such circumstantial evidence. The proof must exclude any other conclusion.

Mr. Rogge:

We will show you that the defendants in this case willingly and knowingly cooperated with the Bund and sent their own writings and literature and publications to the Aryan Bookstore, the Nazi propaganda outlet in this country to be distributed. At the end of this case we are going to ask you if the defendants in this case were not a part of the Nazi movement and did not put out their literature to favor the Nazi movement and destroy our form of government, why did they distribute their literature through the Bund's Aryan Bookstore?

Comment:

What an absurd rhetorical question! One can think of any number of good reasons why the defendants might have sold their literature to the Aryan Bookstore other than the reasons Rogge insists the jury should infer. The asking of such a question shows the impropriety of his entire case—its irrationality and unfairness. The mere fact that certain of the defendants found outlets for their literature through the Bund's Aryan Bookstore proves absolutely nothing relevant to the charge and nothing criminal or even improper. People who write books and pamphlets naturally want to sell as many as possible. Normally, they do not care who buys their writings. Why should they care? Even if a tradesman sells supplies to some one he knows to be making illicit alcohol, he may not be held guilty of conspiracy to make such alcohol (*U.S.* v. *Falcone,* 311 U.S. 205).

On the point of guilt by association and prosecution attempts to confuse the simple issues of fact—was there intent? Was there clear and present danger?—we refer our readers to the dicta laid down recently by the Supreme Court in the five civil liberties reversals, particularly in the cases of the alleged communist Bridges and the twenty-four Bundsmen, all cited extensively in other connections in this book.

When a government attorney in an American court talks about "ideas which were actually made in Germany" it is time to open the windows and let a draught of fresh air sweep through the room. It is time to stop, look and listen. It is time to ask whether we are back in the dark ages when people were tried before theological tribunals for holding or trafficking in heretical ideas. Hitler's racial ideas, as every informed person knows, had wide currency in England and France long before Hitler was born. Englishmen like Thomas Carlyle and William Houston Chamberlain and Frenchmen like Count de Gobineau formulated most of these ideas long before the Nazis. Rogge talks about an international traffic in ideas as one would expect a federal prosecutor to talk about an international trade in narcotics or white slaves.

The authors of this book hold no brief for the literature or ideas trafficked in by the members or bookstores of the Bund or of any of the defendants whose writings may have been sold by Bund bookstores. They merely make the point that the argument and hypothetical question posed by Rogge above mark a new low in pleading before the federal courts.

We emphasize Rogge's asking of this question since it indicates clearly how he expected to convict the defendants. At the close of his case, he would say to the jury: "If the defendants are not guilty, why did they allow their books to be sold by a Bund bookstore?" A case which relies on this sort of argument and appeal to the war hysteria of a jury, marks an all-time low in the abuse of freedom of the press and freedom of speech in America.

Mr. Rogge:

The Government will further show you that the *Weckruf*, the Bund newspaper, actively supported and quoted many of the defendants in this case, who, the Government charges, were all part of the same Nazi movement.

Comment:

The utter absurdity of the case is perfectly exemplified in this sentence in which the prosecutor offers as proof of the conspiracy charged a showing that the Bund newspaper supported and quoted many of the defendants in this case. Take the word "supported," what does it mean in terms of intent, of clear and present danger and of criminal conspiracy to cause insubordination in the armed forces? Does it mean that the Bund newspaper merely endorsed certain views expressed by some of the defendants as it endorsed certain of the views of various high government officials and leading personalities? As Rogge used the term and as the context of the evidence put in shows, it means just that. Of course, the term "supported" could have meant and could suggest to the jury that the German-American Bund paper gave financial and moral support to the defendants. There would have been nothing unlawful, unnatural or improper in the fact that the Bund newspaper supported the political campaign for office of any defendant or endorsed his expressions of political opinions.

As for the fact that the Bund newspaper "quoted" certain of the defendants, what probative value as to the charge of the indictment could such quotations possibly have—even coupled with the additional fact that the Bund newspaper fully endorsed the views or sentiments it quoted from one of the defendants, unless those views solicited, incited, counseled or tended to cause insubordination in the armed forces? In the case of Lawrence Dennis, as already stated, the only evidence involving him in the entire trial was the fact that the Bund paper, over a period of years, seven times quoted from his writings. These quotations are given in the Appendix, page 439. Yet Rogge, on the occasion of the hearing of the motion of certain defendants for a speedy trial in March 1945, four months after the mistrial had been declared, had the temerity to state in open court that he considered that the government had proved its case against all the defendants! When, in the seventh months of the Trial, Rogge made a similar declaration, all defense counsel instantly rose to their feet to announce that the defense was ready to go to the jury forthwith without any evidence being presented for the defense and without argument. And Rogge promptly slumped back into his chair in silence.

Mr. Rogge:

The Nazi Party in Germany had another means of coming to power besides propaganda. That was the Nazi Storm Troopers. The Bund, following the pattern of the Nazi Party, also had Storm Troopers, and in the early days called them Storm Troopers. We will show you that the meetings of the Bund were carried on in such a manner as to cause an outsider to believe he was in Nazi Germany.

Comment:

As for the Bund having uniformed corps, it is to be remarked that nothing could be more one hundred per cent American than the practise of a fraternal organization wearing a distinctive uniform and marching. Most of our fraternal orders have these features, for examples, the American Legion, the Knights Templars, the Knights of Columbus, the Junior Order of American Mechanics, the Shriners, the Boy Scouts and scores of other organizations.

Professor Frederick L. Schuman, long a bitter foe of the Nazis and author of many books and articles denouncing them, in his book, *The Nazi Dictatorship* (Alfred A. Knopf, 1936), pointed out that the three most important and characteristic techniques of the Nazis had had their earliest and most advanced development in the United States. They were, Schuman pointed out, the wearing of uniforms and marching by members, the arts of advertising and propaganda which every one knows have achieved their highest perfection in the United States, and the fine art of spellbinding, in which American rabble rousers from the days of Patrick Henry down to the days of Robert Ingersoll, William Jennings Bryan and Billy Sunday, have led the world.

A far stronger case can be made out for the proposition that Hitler learned the uses of uniformed phalanxes, of propaganda, advertising, ballyhoo and spellbinding from America and American past masters in these arts, than that the defendants or any other Americans had ever learned anything about these techniques from the Nazis. An American demagogue who wanted to achieve in this country a success comparable to Hitler's success in Germany, if he were intelligent, rational and at all likely to succeed, would try to learn from American experts like Patrick Henry, Andrew Jackson, Robert L. Ingersoll, William Jennings Bryan, Billy Sunday, Phineas Barnum who said that there was one born every minute, and Huey Long who said America would get Fascism at home by fighting it abroad, and not from Nazi copiers and imitators of these great American experts. And as for organizational patterns, an American would-be dictator would study the Ku Klux Klan, the Know-Nothings, the Molly Maguires and many other native organizations, developed to a high degree of effectiveness long before Hitler was born and copied from by Hitler.

As for Rogge's statement that the evidence would show that the meetings of the Bund were carried on in such a manner as to cause an outsider to believe he was in Nazi Germany, how could that help being true of an organization composed entirely of Germans, who conducted their exercises in the native language and who were sympathetic rather than hostile to the then existing regime in Germany? To say that German, and the German language and ways are un-American, is obviously true. Anything not American and unintelligible to Americans is un-American, if one wishes to use the term un-American to mean anything not American. But one can also argue, with considerable logic, that the only hundred per cent Americans are the Indians and that they have lost a lot of their original Americanism since the whites first landed and took over the land of the Indians. Our language is English. Our laws and institutions owe much to many countries, including Germany. Most Americans, for instance, are Protestants and Protestantism is certainly an ism that arose in Germany.

Mr. Rogge:

We will show you that at the Bund meetings the main allegiance was not to the American flag, but to the Swastika of Nazi Germany.

Comment:

This, of course, the German-American Bundist defendants denied. The authors express no opinion as to the truth or falsity of the assertion. They merely insist on two points in this connection:

First, the allegation is utterly irrelevant to the charged offense of conspiring to cause insubordination in the armed forces.

Second, the allegation raised just one more collateral issue of fact and interpretation in a trial which was already of preposterous quantitative dimensions, having encompassed the entire globe, over twenty years in time, and millions of people. At what Bund meetings was the main allegiance not to the American flag? How was this assertion to be proved? What is "main allegiance"? When an organization composed of natives of another country displays the flags of their native land and their adopted country, when they sing the national anthems of both countries, when they conduct ceremonies in their native language, as the evidence submitted by Rogge disclosed, how can it be judicially determined from such evidence to which of these two flags those present owe their main allegiance? Some of the participants would be naturalized Americans and some who had their first papers. They would say their first allegiance was to America. Others would be still German citizens. They would have to say their main allegiance was to Germany. How could such evidence as Rogge had to offer permit a jury to go behind these statements of the participants as to where their main allegience was owed? One might as well hold court on the question whether a given man loved more his deceased wife or his second wife.

It is a fundamental principle of criminal law that when a man is being tried for the commission of a specified criminal act, the prosecution may not introduce in evidence against the accused everything the prosecutor can scrape together to create prejudice in the minds of the jury against the accused. Should the defendant introduce evidence of good character, the prosecution may rebut it with evidence of bad character. But until the defendant presents character evidence, the prosecution has no right to offer evidence tending to show bad character. Most of the evidence promised by Rogge in his opening could only have the purpose of showing that the defendants were a bad lot, in that they were friendly or had been friendly to Nazi Germany or unfriendly to the Jews. If evidence of this nature is admitted against all norms of judicial fair play, and if there is any pretense at observing due process in the conduct of the rest of the trial, then the proceeding is bound to assume farcical proportions, for the defendants have the right to challenge with appropriate cross examination and, when their turn comes, with appropriate counter evidence all such evidence tending merely to show bad character.

Of course, in a conspiracy case the prosecution has wide latitude in the matter of presenting evidence. This is one reason why the conspiracy charge is so popular with the Department of Justice and so much abused. Rogge far exceeded the latitude reasonably permissible under any theory of trying a conspiracy case. The trial judge tried to meet this exigency of Rogge's case by saying that he admitted much of the evidence "provisionally" as his honor put it. But it takes just as long to cross examine on "provisionally" admitted evidence as on evidence admitted by the judge "absolutely." And the original impression made by evidence admitted "provisionally" cannot be assumed to be undone merely by having the judge later announce that it is not to be considered by the jury.

Mr. Rogge:

We will show that there was no praise for the President of the United States, but only praise for the conspirator Hitler. The song they sang with loud voice was the Horst Wessel song, the official anthem of Nazi Germany.

Comment:

Here again another irrelevant, collateral issue of fact is raised, since the Bundists insisted that they sang the American national anthem whenever they sang the German anthem. In any event, how could an issue of fact of this character be relevant to the charge in the indictment?

Mr. Rogge:

One of the first of the other defendants to join the Nazi movement in this country and collaborate with the Bund was William Dudley Pelley. The defendant Pelley joined the Nazi movement the day Hitler became Chancellor, January 30, 1933. The defendant Pelley has stated in writing, the evidence will show, that when he read a headline that day about Hitler becoming Chancellor, he announced: "Tomorrow we have the Silver Shirts." And so we have another shirt movement.

Comment:

The authors of this book do not undertake to state defendant Pelley's side. We merely call attention to the impossibility of proving that "Pelley joined the Nazi movement the day Hitler became Chancellor" unless Pelley admitted it or unless some record or competent testimony showing Pelley's membership in an organization called the Nazi movement or by some similar name could be produced.

The most or the worst such promised evidence could possibly show against Pelley in this respect is that the day Hitler came to power in Germany Pelley decided to imitate Hitler to the extent of starting a shirt movement of his own in this country. According to Rogge's theory, the starting by Pelley of his own organization called the Silver Shirts constituted joining the Nazi movement. Well, that is not something that evidence can prove. That is purely a matter of opinion or interpretation.

The Fascists of Italy and the Nazis of Germany wore a distinctive uniform. But so do most fraternal and other organizations in this country. In the state of Massachusetts after the last war the legislature, in a wave of anti-communist hysteria, passed a law against the carrying or displaying of a red flag. One result was to make it a crime for Harvard students to display in public their crimson college colors.

Mr. Rogge:

The Fascist Party in Italy came to power by the march on Rome of Mussolini's Black Shirts.

Comment:

No evidence could possibly show this. The statement is purely an expression of opinion interpreting how the Italian Fascists came to power. All authorities who have written on this subject disagree with Rogge's interpretation. The consensus is that the so-called march on Rome was a flamboyant gesture engineered by the Fascists at the last moment to dramatize their coming to power. The historical facts are that Mussolini journeyed to Rome to take office, riding comfortably in a sleeping car, and that his call to power was arranged with the King and the ruling classes, without which call, the consensus is, Mussolini and his gang could not have come to power. Rogge, of course, was subtly suggesting to the jury that if an obscure American like Pelley formed a group which called itself by some name like the Black Shirts, this was proof that he was conspiring with Hitler to march on Washington to seize power. The fact is that neither Hitler nor Mussolini came to power by marching on the capital and installing themselves in office by a military coup d'etat. In each case, the respective leader was called to power by the duly constituted chief of state in a manner prescribed by law, or such is the version of all historians we have read.

Mr. Rogge:

The Nazis in coming to power in Germany had the mark of the Brown Shirts, the Storm Troopers. The Storm Troopers helped put out propaganda and were used for the purpose of terrorism. In the United States the defendant Pelley helped the Nazi movement by starting an organization known as the Silver Shirts.

Comment:

Here we have more of the same injection of collateral issues of fact. The evidence, no doubt, would have shown that Pelley formed an organization known as the Silver Shirts, though it would have shown this organization never to have numbered more than a few hundred members or to have been of any importance. But just how could evidence have proved that the Pelley organization helped the Nazi movement or constituted a part of it? Evidence of official ties between Pelley's organization and the Nazi Party might have proved Rogge's assertion. But he promised and he possessed no such evidence. He proposed to prove his assertion by showing that Pelley was trying to imitate Hitler. Suppose Pelley was trying to do just that, this fact would not have made Pelley and Hitler co-conspirators or linked them in intent in any common enterprise. Since when has imitation constituted conspiracy? A standard joke of cartoonists is a sketch of a man dressing up and posing as Napoleon. The asylums of the country are full of people with this particular delusion. But not until Biddle and Rogge came to the Department of Justice has the imitation of a foreign dictator been called conspiracy with him to repeat in this country his performances in his own country.

Mr. Rogge:

The defendant Pelley patterned his Silver Shirts exactly after the Storm Troopers of Hitler.

Comment:

So far as the authors of this book know or can say, this statement may be wholly true or wholly false, or partly true or partly false. They only point out how much time it would have taken to prove it and how irrelevant it is to the charge. To have sustained properly the allegation, it would have been necessary to introduce a vast mass of data to show exactly how Hitler's Storm Troopers and how Pelley's Silver Shirts were patterned. Doing this might have taken up weeks or months.

Mr. Rogge:

He organized units of Silver Shirts in various parts of the United States.

Just as the Nazis in Germany and the German-American Bund in this country had publications, so the defendant Pelley had publications.

Comment:

Here Rogge is again hitting a new low. It would have been equally probative of the charge to have said: "Just as every religious group, every political movement, every cause and every large trade or labor group had publications, so the defendant Pelley had publications." Suppose he did. So what? To prove Pelley was a Nazi, Rogge solemnly stated that the evidence would show that both Pelley and the Nazis had publications. That was the sort of logic the government's case was composed of. It was on all fours with saying: "A Nazi has two legs. Pelley has two legs. Therefore, Pelley is a Nazi."

Mr. Rogge:

One of these was a periodical called the "*Liberation*" I have mentioned. He had two other periodicals, one of which he called the *Galilean* and the third which he called *Roll Call.* By Liberation the defendant Pelley meant the destruction in the United States of everything that he and the Nazis were against. This included our form of government, for they were its declared enemies.

The defendant Pelley and his organization cooperated with the German-American Bund. Both organizations frequently held joint meetings. They exchanged literature and both preached the same Nazi propaganda.

Comment:

The Supreme Court, in the Bridges decision, reversing Biddle and the lower court, laid down the principle that cooperation with a party, even the Communist Party, for lawful purposes or in the lawful activities of that party, does not make one a participant in any unlawful purposes of that party. The Supreme Court also said in the reversal of the conviction of the twenty-four Bundists that it had been unable to find in the record any evidence of illegality against the Bund.

CHAPTER XI.

PROSECUTOR'S OPENING STATEMENT (Continued).

Mr. Rogge:

Another defendant who joined the Nazi movement early and who collaborated with the Bund was the defendant George E. Deatherage. And I may say to you, ladies and gentlemen, that during the course of the trial, the government, through witnesses, will again identify these various defendants for you.

The defendant Deatherage had an organization which he called the Knights of the White Camelia. As early as 1936 he was organizing units throughout the country. He called his men The White Knights.

Comment:

Rogge does not explain that Deatherage's organization had been in existence since the time of the Civil War or state the circumstances of its origin connected with the aftermaths of the Civil War and reconstruction in the South. In line with the policy of the authors of this book, they undertake no statement of the history or background of the several defendants and their several organizations, for the making of which the authors do not have the necessary facts. That was one of Rogge's tasks if he chose to put on trial these organizations with their several defendant-sponsors. It was obviously an impossible task. If Rogge had been trying to prove only certain acts or utterances against each of these defendants and organizations to show conspiracy to cause insubordination, his task would have been comparatively easy, in the event he had the necessary evidence. Lacking such evidence, he made assertions about the history, ideology, purposes and characteristics of these different organizations or groups, calculated to create prejudice against them. Instead of trying to prove that each defendant and organization named did something with intent to cause insubordination in the armed forces, Rogge proposed to present evidence from which he could argue and the jury infer that these defendants and organizations were Nazi in character and purpose. Any such conclusion would not have resolved an issue of fact but merely registered the adoption by the jury of an interpretation or a definition advanced by Rogge.

Mr. Rogge:

In 1937 the defendant Deatherage endeavored to join together in one organization various groups which were carrying on the Nazi movement. He called this organization the American Nationalist Confederation, and he intended to make it a political party just as the Nazi Party in Germany was a political party. Its platform was very similar to the platform of the Nazi Party. The American Nationalist Confederation published a paper called the *American Nationalist Confederation News Bulletin.* This was the instrument which the defendant Deatherage used just as the conspirator Hitler had used the *Voelkischer Beobachter.*

Comment:

Note the use of the techniques of identification, association and showing of similarities. Under our theory of law guilt is personal; it does not attach to persons merely by reason of their associations or any similarities they may have to evil-doers. Asserting that any two movements, organizations or activities are the same or similar is easy; proving such assertions is another matter. It runs afoul the difficulties of definition of terms and usually never gets beyond this stage. In any case, such assertions and their support by evidence are irrelevant to the charge of conspiring to cause insubordination in the armed forces.

Mr. Rogge:

Still other defendants who joined in the Nazi movement early and who collaborated with the Bund were the defendants Robert Edward Edmondson and James True.

The defendant Edmondson spoke at Bund meetings, was in contact with the German Consulate in New York and with Nazi conspirators in Germany, and published a multitude of pamphlets filled with Nazi propaganda. He sent his pamphlets in quantity lots to the Bund and to World Service in Germany. He sent his material to Germany through the German Consulate in New York on German ships so that it could be transported free of charge. He received the Bund's publication, the *Weckruf,* and the publication of World Service, which was called *World Service*, from Germany.

On one occasion, the evidence will show, when the defendant Edmondson sent a quantity lot of his material to Germany, he said that he wanted to stand high over there.

Comment:

This sort of evidence, promise of more of which will continue to the end of Rogge's opening statement, is what the authors of this book call merely bad character evidence. It is utterly immaterial and irrelevant whether such evidence against certain defendants be true or false. The trial judge admitted it ''provisionally'' on the theory that it was circumstantial evidence which might, or might not, contribute to proving the government's conspiracy charge. What, apparently, the judge did not realize or consider important was the fact that the admission of evidence of this nature gave the defense a right and opportunity to cross examine, argue objections and, when their turn came, to rebut with as much more evidence of a similar character, all of which could only turn the trial into a farce.

Rogge's case could only have proved manageable under Moscow rules of procedure. Soviet justice concedes few rights to the defendant in a political trial. The purpose of a political trial in Russia is not to arrive at the truth but to propagandize a political message. Rogge's opening statement as well as the indictment betrayed a similar purpose. It was Rogge's tough luck that he could not try his case under Soviet rules of evidence.

Mr. Rogge:

The defendant True had his headquarters here in Washington, D. C. He was in contact not only with the Bund but also with the Germany Embassy and with World Service, the Fichte Bund, and other Nazi conspirators in Germany. The defendant True helped the defendant Deatherage and worked with the defendants Edmondson, Pelley, Joseph E. McWilliams, Gerald B. Winrod and with other defendants.

The evidence will show that the defendants True, Deatherage and Edmondson talked about the time when they would be in power and one of the principal questions was who would be the leader.

Comment:

Note well the inconsistency of this statement with the charge that they were carrying out a Nazi program. There was never a moment in the history of the Nazi Party from the failure of the unsuccessful Munich Beer Hall Putsch in 1923 when any groups of Nazis sat around and discussed who would be the leader of their movement. Maybe if it had only been a movement like Rogge's conception, they would have done just that. But the Nazi movement was also a political party, an organization with a recognized leader. If the defendants had been following the Nazi pattern, they would not have been talking about who would be the leader of their movement. They would have had a leader. They would have been united and disciplined under his leadership.

In connection with this glaring absurdity in Rogge's allegation of the existence of an American Nazi movement, we ask the reader to consider jointly the following assertions culled from his opening statement, given in this book as it appears in the court record:

> 1823 (Chapter VIII, page 136) The evidence will show that a Nazi Revolution in this country according to the intentions of the Nazis and the defendants in this case would have been like this:
>
> A Fuehrer, and the defendants had one in mind—and the evidence will show that the defendants had one in mind.
>
> 1824 (Chapter VIII, page 140) Thereafter the evidence will show that they intended to run this country not according to the Constitution but according to the so-called "fuehrer" principle and the Nazi concept of Aryanism. [Yet Rogge says three of the defendants sat around and "talked about the time when they would be in power and one of the principal questions was who would be the leader." To say that a group of persons were carrying on a Nazi political conspiracy while they were still talking over who would be their leader, is to talk nonsense; to call such persons Nazis is a contra-

diction in terms. Rogge talked nonsense of this sort for over seven months in court.]

1884 (Chapter XII, page 248) The defedants were attempting to come to power in this country, the evidence will show, the same way the conspirator Hitler and the Nazis came to power in Germany. [Did Hitler and the Nazis come to power in Germany sitting around and arguing over who would be the leader?]

1895 (Chapter XIII, page 279) The evidence will show that he was called the No. 1 American Nazi and that he was proud of the label. [This was said of Lawrence Dennis. Why was he not the recognized leader of the American Nazi movement, or the Fuehrer, known to and obeyed by all the defendants? Witness Gissibl, an ex-Bund official, had never heard of Dennis. Witness Luedtke, another ex-Bund official, also testified that he had never heard Dennis discussed in Bund circles.]

The point we have labored here is neither academic nor technical. It is elementary that Rogge's charge of an American Nazi movement in strict imitation of the German Nazi movement, could only be sustained if the evidence showed that the defendants, or alleged co-conspirators, all had one leader as did the German Nazis in their rise to power.

It is important to understand that Rogge was trying to prove a conspiracy in which, according to his theory, all that united and coordinated the conspirators was an alleged nexus of ideas, wishes, motives and purposes. Such a theory is no basis for a conspiracy charge. A political conspiracy to take over the United States must have had a common plan of action. To have been a Nazi type of conspiracy, it must have had a one man leadership.

Why did an intelligent lawyer like Rogge get himself involved in these patent contradictions and absurdities? The answer is that he could not avoid it if he were to carry out the purposes of the people behind the Trial and put on the show they wanted. He could only hope that the defense would not show up his case. As we have already pointed out, one of his difficulties was that his defendants were not linked by membership in one organization like the Communist party, and another difficulty was that none of them had ever said or done anything the government could show to cause insubordination in the armed forces. In the Schneiderman case, Schneiderman admitted being a member of the Communist party. In the Bridges case, the government had testimony that Bridges had once admitted membership in the Communist party. In the Dunne case, all the defendants were admitted members of the Socialist Workers party in question. In the Sedition case there was no evidence that any defendant was a member of the Nazi party or that all of them belonged to any one organization of any sort. Therefore, Rogge had to define all the defendants into his Nazi movement. That movement, being a thing of his own defining, it did not need to have a leader or to be coordinated under one central committee. Rogge hoped to meet all difficulties by making his definition fit any and all facts his evidence might tend to show. The weakness we have just exposed is that this definition of an American Nazi movement did not correspond to the Nazi movement in Germany and that Rogge charged that the defendants were conspiring to follow the German Nazi pattern.

There are far more indications of official contacts, relations and acts of cooperation between the labor movements of Britain, France and certain labor organizations like the C.I.O. in America than could be shown between certain defendants or any defendants in the Sedition Trial and officials of the German Government or the Nazi party in Germany. Yet it would be untrue, as well as absurd, to argue that the labor unions of these countries are in a world conspiracy to do anything. It would be false to say that they even have a common set of ideas, purposes, plans or policies. They do have many ideas, purposes and policies in common, but not enough to justify the statement that they form an international movement. It is only in a highly rhetorical or literary sense that labor groups or religious groups of the world may be said to form a world movement.

What would it prove to show that certain American labor leaders had said in conversation that all American labor organizations should be united under one leadership as in Soviet Russia? What would it prove to show the similarities and associations of labor leaders and groups in this country and abroad? It certainly would not sustain any sort of charge of conspiracy or even lawful confederation. Similarities and associations do not prove conspiracy or even lawful confederation and agreement to pursue given ends or use given means. People in the same line of business are bound to have similarities and associations, one with the other, some with others. As long as a number of agitators talked about "who would be the leader" they were not conspiring. People who are not agreed as to leaders are not likely to be agreed as to ends and means or as to a program of action.

Mr. Rogge:

Just as the Nazis in Germany and the Bund in this country had publications, so the defendant True had a publication. He called his publication the Industrial Control Reports. He sent his publication to the Bund and received the Bund's publication, *Weckruf*.

Comment:

Imagine wasting the time of any court producing evidence to support such allegations!

Mr. Rogge:

The defendants in this case, the evidence will show, joined the Nazi movement for various reasons. We are primarily concerned with determining whether they did in fact join and whether or not one of the purposes of the movement was to cause members of our armed forces to be disloyal in violation of the Act of June 28, 1940.

Comment:

In the last two sentences are compressed the main issues of fact in the trial:

Was there such a thing as the Nazi movement Rogge alleged? There was a Nazi party in Germany. Membership in that party was susceptible of proof. But Rogge's world movement of ideas, tendencies and aims of people who could not agree on a leader or a joint program of action, even in America, was purely a thing of Rogge's assuming and defining. The answer to this question, of course, is that if you accept Rogge's definition, you thereby admit the guilt of all included in the definition. Thus, the issue is not one of fact but of the validity of a definition of a Nazi world movement, a part of the definition being that everybody in the movement was trying to cause insubordination in the armed forces.

After listening for over a month to Rogge's interminable evidence offered in support of his assertion of the mythical world movement, defense counsel grew more and more restless. At first, they were disposed to be patient and tolerant with Rogge's evidence on the theory he was laying a foundation for the main structure of his case, which the lawyers thought would have to do with causing insubordination in the armed forces. As the months dragged on with continuous repetition of the same kind of irrelevant and immaterial evidence, defense counsel St.George would arise at the beginning of each month and beg the trial judge to take charge of the case, stating that Rogge apparently did not know what the case was about, that he was blinded by his fanaticism and thus unable to see the issues involved, that he was continually circling the globe in a fast plane seeking a Nazi world movement to destroy democracy throughout the world, including the United States, and that he was unable to come down to earth or to come to the point: did the defendants conspire to cause insubordination in the armed forces?

Mr. Rogge:

For reasons of their own, the defendants in this case, living in various parts of the country, joined the Nazi movement. Many of them deemed it advisable to form a united front to carry on their campaign. The evidence will disclose the steps that were taken to get the organizations of the defendants in this case together in one group. There was a difference of opinion among the defendants as to whether the time was proper when they should join together in a single organization.

As early as 1937 the defendant Deatherage wanted all the Nazi groups to join together, but other defendants believed that they did not yet have sufficient strength or numbers to admit that they were all working together.

Comment:

Note the repeated use of the question-begging technique of asserting in the form of an adjective the main proposition at issue. Thus, Rogge says, "Deatherage wanted all the Nazi groups to join together." The most he was entitled to say was that the evidence would show that these were Nazi groups, with some indication as to what would be the nature of the evidence.

Mr. Rogge:

The evidence will show that they were, in fact, working together and they kept on working together until the time that this indictment was filed, but they never formed a single organization. That fact, however, makes no difference under the charge of conspiracy. The fact for you to determine is whether they were in fact working together in this illegal movement, and if you find that they were and that they knew there was such a movement or conspiracy in existence, it is immaterial that they had separate organizations rather than one single organization.

Comment:

The preceding passage is of the highest importance as an example of Rogge's tricky use of words, making his carefully and all-inclusive word "movement" interchangeable with the conspiracy charged in the indictment. What he says in effect to the jury is: "If you accept my definition of movement, then you must find the defendants guilty, since the movement I have defined to you is the conspiracy to cause insubordination charged in the indictment."

He was correct in saying that the defendants never formed a single organization. He may have been right enough as to the law when he said that this fact made no difference under the charge of conspiracy. That is to say, the defendants could have entered the conspiracy charged or any other conspiracy chargeable under law without necessarily having for that purpose formed an organization to carry on the conspiracy. The question here is simply what did they say or do to show that they had joined the conspiracy alleged? Rogge sidesteps any such question or line of reasoning by going off on a tangent about his movement. The word "movement" is the key to Rogge's whole case and to the basic fallacy of that case. The trick to his case was the substitution of a definition of a political movement for proof of the conspiracy to cause insubordination charged. As we have covered this point pretty fully in Chapter VII, we need not go into that matter again, except to call attention to the repeated use by Rogge of the concept movement of his own creation as a substitute for proof of the conspiracy charged.

There is nothing wrong with using the word "movement." But it cannot be used as a substitute for the word "conspiracy." "Movement," in the sense Rogge uses it, as we saw in Chapter VII, page 108 is a loose term. "Conspiracy," for criminal law purposes, has to be a very exact and precise term. Webster's International Dictionary defines conspiracy very definitely as follows:

> An agreement, manifesting itself in words or deeds, by which two or more persons confederate to do any unlawful act, or to use unlawful means to do an act which is lawful; confederacy."

It is silly to talk about members of a criminal conspiracy having joined a movement, or to call a conspiracy a movement. There is law against various types of conspiracy. There is no law against any type of movement. Movement is not a sufficiently precise term for criminal law purposes. Movement does not and cannot convey the necessary idea of common criminal intent for a conspiracy.

If the state wants to legislate against certain things a given organization or movement preaches or practices, it legislates specifically against the preaching or practicing of such concretely defined acts. It does not legislate against the movement. Let us illustrate: Laws were passed against polygamy, not against the Mormon Church. Laws were passed against advocating the overthrow of the government by force and against counseling or causing insubordination in the armed forces, not against the Communist party or the Communist movement. The laws against polygamy did not denounce a world polygamy movement and provide a penalty for any one belonging to the world or any other movement for the spread of polygamy. Laws have to be specific if we are to have freedom and due process of law. Laws were passed against preaching or practicing polgamy, which, as defined by law, is not an idea or doctrine but certain extremely concrete acts.

It might make sense in many connections to talk about a free love movement or a movement of loose morals, but there would be neither sense nor justice in confusing a morals charge with talk in any such terms. Everything the law has a right to prohibit and punish under the head of free love or loose morals is fully and exactly defined by existing law as to specific offenses against good morals. The same is true of offenses against the morale of the armed forces. They are very specifically defined in the Smith Act of 1940 and the Espionage Act of 1917. To prove a charge of conspiracy to impair the morals of minors or a charge of conspiracy to undermine the morale of the armed forces, it is not necessary to talk for hours as did Rogge about a movement of ideas.

Let the reader not think for a moment that the authors of this book are making a mountain out of molehill in connection with their attack on Rogge's use of the term and concept ''movement'' in his prosecution theory, as a synonym for a conspiracy to cause insubordination in the armed forces. What we are upholding in this connection goes to the heart of the whole matter of freedom of speech, civil liberties, due process of law and equal justice before the law. Freedom is as much a matter of legal procedure as of substantive law. It is the law in action, rather than the law on the statute books, which affects the citizen.

Getting down to brass tacks, one may say that if proof of the existence of a world movement of ideas could be substituted for proof of a criminal conspiracy, anybody against whom the government wanted to frame up a prosecution theory of history and ideas could be convicted of criminal conspiracy. Everybody who expresses or holds ideas of any sort can be defined into a world movement of ideas. If anti-Semitism equals Nazism and Nazism equals conspiracy to cause insubordination, any brand of socialism can be made to equal Russian communism and, if popular feeling were aroused against Russia, Russian communism could equal conspiracy to commit almost any crime in the catalogue.

Mr. Rogge:

The evidence will show that the defendants were not only working together knowingly in the same Nazi conspiracy but that they were also planning a single organization when the time came to impose on us their Nazi form of government. The evidence will further show that the defendants, in order to carry out their planned Nazi revolution, were intending to make use of our Army, the members of which they were going to cause to be disloyal to our present form of government.

The defendants sought to overcome the reluctance of some of the groups to join in a single organization in the early stages by choosing as a leader an outstanding personality whom they could all agree to follow and who also could get a following among the American public. Because of the desirability of having the army converted to Nazism, they thought in terms of an army man for the leader. One of the men who fitted well into their plans as a possible leader was General George Van Horn Moseley, at one time second in command of the United States Army.

To what extent General Moseley joined in this movement we are not here concerned because there is no evidence that he was associated with the defendants after 1939. It does appear, however, in the evidence that General Moseley did have views which these defendants believed qualified him to be the leader of the movement. They believed that at a time when Moseley was an active general in the United States Army. However, General Moseley does not appear to have become actively associated with any of the defendants until he retired from the Army. The defendants with whom he particularly associated were Deatherage, McWilliams, Pelley and True. The defendant Edmondson got out a pamphlet in praise of General Moseley which he entitled *"Heil Moseley."*

The defendant Deatherage, when he thought that he had found the leader in General Moseley and that the propaganda campaign which he and other defendants had carried on for several years had won enough members of the armed forces and other people to the Nazi cause so he could come out in the open, decided in April 1938 that it was no longer necessary to conceal the real object of the movement. Up until that time, the evidence will show the various groups named in the indictment called themselves anti-communist groups. That was the main label which they used to identify themselves. They had another label which they used for the same purpose. They called themselves "patriotic" groups. They did not mean by patriotic the same thing that we mean.

Comment:

The above references to General Moseley, formerly

Deputy Chief of Staff of the United States Army, as having been the choice of several of the defendants for the post of Fuehrer of their proposed Nazi-America adds another element of circumstantial evidence, out of the mouth of the prosecutor himself, in contradiction of his prosecution theory. A movement on the Nazi pattern would never for a moment be without a Fuehrer of its own. It would never be shopping around for a Fuehrer. Certainly no movement on the Nazi model would want for its Fuehrer an over-age retired army officer. Field Marshall Ludendorff marched with Hitler at the time of the Beer Hall Putsch and many high-ranking German officers went over to the Nazis, but no retired German general was ever considered for Hitler's place. Moreover, a movement, allegedly aimed at causing insubordination in the armed forces, would hardly want for its leader a West Pointer who had made a long and successful career as a soldier and disciplinarian.

Rogge talked a lot about defendant Deatherage but in seven months of trial he failed to offer any evidence that Deatherage had won over one member of the armed forces or even attempted so to do. Moreover, the Trial failed to yield a scintilla of evidence that Deatherage's movement was anything more than a paper organization or just a hope in his mind.

Mr. Rogge:

The evidence will show that they did not mean patriotism to our form of government.

Comment:

This sentence gives another insight into the intellectual dishonesty of Rogge's reasoning. The word patriotism in no language refers or even remotely relates to any form of government. Patriotism relates only and exclusively to one's native or adopted land, and by extension to its welfare.

Mr. Rogge:

By patriotic, the evidence will show, that they mean they wanted a Nazi or Fascist form of government in this country.

Comment:

Rogge uses the term Nazi and Fascist as interchangeable or meaning the same thing. Whatever these terms may mean, they are not synonyms. There are various senses or contexts in which both Fascism and Nazism may be linked as examples of the same sort of thing or as similar isms. But there are senses in which communism may also be linked with both Fascism and Nazism. All three, for instance, are totalitarian systems. One of the defendants, Lawrence Dennis, in his book named in the indictment, did link communism, Fascism and Nazism together as variants of the same world-wide movement or trend towards a planned economy and a totalitarian state. A number of writers have termed the Roosevelt New Deal "Fascist" in character and tendency. A good case can be made out for the thesis that communism, Fascism and Nazism were all in the same movement with the New Deal in America towards collectivism, authoritarian government, a planned economy and totalitarianism. But such a statement would afford no basis for the charge or argument that all who were in this world-wide movement were co-conspirators for the realization of any common set of ends or the use of any common set of means.

So far as the defendants and the advocacy of a Nazi or Fascist form of government were concerned, the evidence in the Trial did not support Rogge's charge in the slightest. The defendants were not political theorists. They were not members of one party or organization having a formally stated program. With possibly one or two, three at most, exceptions, the defendants had not the remotest idea as to what were the doctrines and principles of either Fascism or Nazism. Rogge's thesis was that approval of certain drastic measures against the Jews or the communists constituted approval of a Fascist or Nazi form of government, or that racialism or race prejudice was the equivalent of Fascism. Nothing could have been more absurd or fallacious.

Mr. Rogge:

In April 1938, the defendant Deatherage believed that he and other defendants had impaired the loyalty of enough people, both in and out of the armed forces, to our form of government so that he could come out in the open and he announced that the program which he and other defendants had carried on and the program of the American Nationalist Confederation was a Fascist program. At the same time he put the swastika on his publication.

I have told you previously that there was no law against what the defendants were doing in 1938. The defendant Deatherage could safely admit that he was sponsoring a Fascist form of government in this country. The only reason for not admitting it sooner was because he believed the better policy to be to wait until his organization and the other groups in the indictment were strong enough to stand up and say what they were really after.

Comment:

The last paragraph above shows clearly that Rogge proposed to prove that the advocacy of what he called "a Fascist form of government" was the same thing as conspiring to cause insubordination in the armed forces, or that such advocacy constituted a violation of the Act of June 28, 1940. That this is not true and that it is both absurd and unreasonable may be seen by any fair minded person who reads the text of the law. It may also be seen from the opinion of the Court of Appeals in the Dunne case, already cited. There it was explicitly stated that the Smith Act of June 28, 1940 does not penalize advocacy of any ism or any change in our form of government. It only penalizes advocacy of such change by means of the violent overthrow of the government or of mutiny and insubordination in the armed forces.

Rogge, throughout his opening statement, tried to indoctrinate the jury with the idea that the Act of June 28, 1940, under which the defendants stood indicted, made the advocacy of Fascism or Nazism a crime, and with the further idea that anti-Semitism and anti-communism equalled the advocacy of Fascism or Nazism. A government witness, Henry Allen, who testified at great length as to conversations he had had with defendant Deatherage, in which the latter had said many things about Fascism and Nazism, admitted that neither he nor Deatherage had ever discussed the principles of either ism. The government presented no evidence to show that Deatherage had ever understood or expounded the theory, teachings or doctrine of either Fascism or Nazism; nor, for that matter, that any defendant had done so.

The government's evidence on this point tended only and mainly to show that the ideas of those defendants whose indiscreet talk about Nazism and Fascism was put in evidence consisted essentially of the following two general notions or propositions: 1. The Fascists and the Nazis had the right idea or policy as to the Jews and the communists. 2. Something of the same nature was desirable in the United States. Not all the defendants had expressed such views. Those who had expressed these views had expressed them in different ways and in different degrees of definiteness or intensity. It would be impossible to formulate a fair or accurate generalization about the views of all the defendants on these points, since their views differed so widely. If one chooses to refer to anything as broad and inclusive as the Temperance movement or the anti-Semitic movement, one cannot formulate a valid indictment to cover all the people who might be included in one's definition of such a movement. Some people in the Temperance movement believe in total abstinence and prohibition; others believe in moderate drinking. About the only generalization that would fit everyone in the Temperance movement would be to say that they all think and talk a great deal about the evils of alcohol and favor doing something to curb such evils. The same sort of generalization is about the only one that would apply to everyone who might be called a member of the anti-Semitic movement.

Where a large number of people talk a lot about something they consider an evil or menace and favor doing something about it, it invariably happens that they say different things and favor doing different things about the evil or menace. Therefore, they cannot be called conspirators or confederates. There is not the agreement among them as to action to be taken that is required to establish the existence of a conspiracy. You cannot have a conspiracy to use an unlawful means unless you have agreement among the conspirators as to that means. It would be ridiculous to argue that everybody who says that something ought to be done about the Jews and the communists is in a conspiracy to do certain things about the Jews and the communists that the Nazis, for instance, actually did.

At the time this book was being written, the President of Dartmouth College was subjected to violent attack by the Jewish owned *New York Evening Post* and by *PM* as well as other spokesmen for the Jewish extremists for having made certain statements about what his institution did in the way of limiting the number of Jews admitted as students. The making of that statement by President Hopkins put him in the anti-Semitic movement according to the *New York Evening Post,* which was behind the Sedition Trial and prosecutor Rogge. Yet President Hopkins had been most emphatic in denouncing the treatment by the Nazis of the Jews and in excoriating anti-Semitism. But, on the general theory that anybody who says that something should be done about the evils of alcohol is in the Temperance movement or that anybody who says that something should be done about the Jews is in the anti-Semitic movement, President Hopkins clearly qualifies for membership in the Rogge definition of the movement.

Mr. Rogge:

The evidence will show that the defendants who cooperated with the defendant Deatherage before he openly admitted that his party was a Fascist party contined to cooperate with him after he made this statement.

The evidence will show that the defendants were not interested in local problems, as such, in this country. While they talked about local problems in their propaganda, they did so only for the purpose of creating discontent. The sole interest of the defendants was to further the Nazi cause.

Comment:

The last sentence merits careful analysis as throwing light on Rogge's mental processes about the Trial and its issues. He was an anti-Nazi fanatic, of course, and he readily assumed that the defendants were all Nazi fanatics. There were fanatics among the defendants, but the native American defendants could not be shown by any evidence to have been Nazi or Fascist fanatics. Though the authors are convinced that none of the score of native American defendants were Nazis and that only one or two of the German-American defendants could ever have been fairly termed Nazis, they do not here advance or try to prove any such statement about the defendants. They say, merely, that Rogge's statement, "The sole interest of the defendants was to further the Nazi cause,'' was not susceptible of proof, the state of the evidence being what it was.

To illustrate this point, we call attention to the numerous trials in France of Frenchmen, including Marshal Petain, charged with collaboration with the Nazis during the German occupation of France. In all these trials the legal issue was simple. According to the French prosecutors, France, during the German occupation, was technically at war with Germany, no peace ever having been concluded; therefore, all Frenchmen who collaborated with the Nazis were having unlawful relations with the enemy. This is a valid or tenable legal theory of the situation. Of course, according to it, all Frenchmen during the German occupation, in order to preserve their innocence of guilty collaboration with the enemy, would have had to have pursued a course of conduct which would have rendered impossible any French local government and would have made it necessary for the Germans to exercise through German soldiers or agents every single governmental function throughout the length and breadth of the French land under German control. In the collaborationist trials in France the prosecution did not have to prove that the accused had the motive of furthering the Nazi cause. Indeed, it did not have to prove any motive at all. It had only to prove the fact of voluntary collaboration with the enemy.

In the Sedition Trial, however, Rogge's task was different. It was no crime before Pearl Harbor for Americans or German-Americans in this country to collaborate with the Germans, say, to keep America out of the war. According to the theory he conceived for the prosecution, Rogge had to prove that the defendants collaborated with the Germans in the criminal enterprise of trying to cause insubordination in the armed forces. He had to give a motive for such collaboration or conspiracy. He chose as the motive a purely political one. ''The sole interest of the defendants was to further the Nazi cause.''

The proposition just quoted from Rogge made his case even more impossible of proof. Where there is a real conspiracy to do wrong, the motivation is usually filthy lucre and neither political nor religious. Crimes of passion are rarely the objects of conspiracy. They are usually one or two-party affairs. A truly political conspiracy to seek an unlawful end or to use unlawful means to a lawful end is, of course, possible, but to have such a conspiracy, the conspirators must be animated by a common political motivation. But when a criminal conspiracy is charged in which it is alleged that the sole interest is the political, non-mercenary one of serving the Nazi cause, it is practically impossible to produce sufficient relevant evidence to prove such an allegation of interest and motive against twenty-nine persons, twenty odd of whom are native born Americans without a drop of German blood and without any sentimental ties to Germany. Rogge tried his best to de-Germanize Nazism; to make of his Nazi world movement something that was utterly international and non-national and, particularly, non-German. But that, obviously, did not make sense. Nazism was nothing if not German.

If Rogge had had evidence to sustain the theory that all the defendants were venal, mercenaries who had played the Nazi game for money or selfish considerations or personal advantage, his case would have been simple and easy. Such a case would have been a proper one for a jury to try, under a proper indictment. But if the evidence could have shown that the accused conspired to cause insubordination in the armed forces, or to do anything else criminal, it would have mattered little what their motive or interest was in so doing or who paid them to do so. The fact they conspired to tamper with the morale of the armed forces would have sufficed, especially in wartime, to convict them.

And in the statement of Rogge just quoted there crops up again the ever-present issue of definition of terms used. Rogge says that "the sole interest of the defendants was to further the Nazi cause," thus exculpating them of any venal or mercenary motivation. But what is "the Nazi cause"? Let not the reader lightly assume that the answer to this question is simple or easy. Before Pearl Harbor, the Nazi cause in America was unquestionably that of keeping America neutral or out of the war. Any American who tried to preserve American neutrality and keep America out of war, any American who opposed President Roosevelt's unneutral acts and policies of intervention in the war on the side of the Allies, could be said to be serving the Nazi cause. We do not think that would be a fair statement, since such a person, we think, would properly claim that he was serving the American cause. The important fact to keep in mind here is that a person following a given course in a given situation may be serving both a foreign cause and what he sincerely believes to be, and what according to the verdict of history may be, his own country's cause. The point is that a foreign cause and one's own country's cause may at times be the same. Thus, while American and Russian armies were fighting Germany, the cause of Russian communism was the cause of American democracy. But it would be bad taste, and fundamentally untrue even if in a sense true, to say that an American who died fighting the Germans had died fighting for the Russian communist cause. He died fighting for his own country's cause. When a soldier fights, presumably, he fights for the cause of the country whose uniform he wears and under whose colors he fights. If that cause momentarily in the given fight happens to be also the cause of another country, that does not make it fair or completely true to say that he is fighting for the other country's cause.

If Rogge could have shown by evidence that the defendants had ever owed allegiance to the German Nazi party or fought under its colors, there might have been justification for his saying that their "sole interest was to further the Nazi cause." He sought to justify that statement by showing that some of the causes for which certain defendants fought or agitated happened also to have been in some past period the cause of the Nazis. That was as unfair and substantially as false as saying that an American who died fighting the Germans in this war had died fighting for the Russian cause.

In passing, the authors take this occasion to emphasize Rogge's statement that "The sole interest of the defendants was to further the Nazi cause" in connection with the pre-Trial propaganda put out for the prosecution by the American Civil Liberties Union to the effect that a reason for its non-participation in the case was the fact that it had been told there was evidence that the defendants had been in the pay of the Germans. Yet Rogge, in his opening, promised no such evidence, except that he referred to the well known fact that defendant Viereck had been a German public relations counsel in the pay of the German government. And in the Trial no attempt was made in the evidence against Viereck to bring out the fact that he had been in the pay of the Germans. Obviously, that was no crime. And the Civil Liberties Union lawyers knew perfectly well that the charge in the Sedition Trial was not that the defendants had been in the pay of the Germans, but that they had conspired to cause insubordination in the armed forces. They could have been guilty and never have received a cent of German money. They could have received thousands of dollars from the Germans as did Viereck and be perfectly innocent of the charge. German money had nothing to do with proof of guilt or innocence of this charge. Talk about German money was a slick trick to confuse the issue and create prejudice against the defendants before the Trial, in the use of which the American Civil Liberties Union cooperated with Rogge and the Department of Justice.

Mr. Rogge:

When they talked about local problems they did so in line with the Nazi propaganda technique for softening up and disintegrating the existing social structure and in order to help the Nazi cause.

Comment:

How could such a statement be proved by evidence an ordinary jury could competently evaluate?

Mr. Rogge:

They cooperated with the Nazis not only in Germany but also in other countries.

I have told you that the objective of the Nazi movement, originating in Germany, was to establish Nazism throughout the world.

Comment:

Once more we must pause and digress to point out how utterly unprovable, as well as completely irrelevant to the charge, such a statement must be within the framework of the rules of evidence and trial by jury. The fact of the matter, as every expert or well read person in this field must know, is that the majority of authorities and writers emphatically disagree with Rogge on this point. The authors have no wish to argue any thesis of their own as to this question or as to what were the objectives of the Nazis.

They merely state that authorities are generally agreed that it was not the objective of the Nazis, followed by them during the period in question, to set up Nazism throughout the world as Rogge alleges.

During cross-examination of the government's star witness, Dr. Herman Rauschning, defendant Dennis forced from him the admission that in most territories, like France, Rumania and even Belgium and Holland, the Nazis had not put in power native "Fascists" so-called, but rather conservatives like Petain in France, General Antonescu in Rumania and Admiral Horthy in Hungary. In France the Nazis had plenty of native French "Fascists," so-called, whom they could have put in power instead of Petain—men like Doriot or Deat. In Rumania, the Nazis had the Iron Guard from which to pick native Rumanian "Fascists." In Hungary, there was also a strong native "Fascist" movement. In each of these three major countries to come under Nazi domination during the late war, the Nazis worked with conservatives and traditionalists like Petain, Horthy and Antonescu who gave little encouragement to native or local "Fascists" so-called. In Norway the Nazis did foster and use the native "Fascist" Quisling, but only because they could not find any native conservatives, liberals or traditionalists who would co-operate with the Nazis. And in Norway, the Nazis had to do most of the governing for Quisling.

Rogge's prosecution theory imputed to the Nazis an adherence to the classical communist policy of world revolution which many Nazis did at times consider and advocate in public discussion. But the record shows that the Nazis never made this their over-all or general policy. It cannot be said that they ever followed it completely or consistently as Rogge charges, not in any country, not even in Norway or Slovakia or Holland or Belgium. On this point the article by Drucker, already referred to, is quite explicit and emphatic.

Drucker pointed out that some Nazi zealots had thought of Nazism as a permanent revolution which would eventually sweep the earth, more or less as the communists feel about communism and as Rogge's prosecution theory postulated for the Nazis. But, as Drucker remarks, this permanent-revolution idea for Nazism came into conflict with the practicalities of traditional power politics as practised by the Nazi war lords. It was not compatible with either the power objectives of the Nazi domination of most of Europe from 1940 to 1945. Nor, by the record, was it the idea or policy the Nazis actually followed. The Nazis did use in minor ways and small areas some so-called native "Fascists," but, as Drucker and all other writers on this point have repeatedly pointed out, the Nazis put the administration of countries under their control into the hands of the traditionalist ruling classes. A reason for so doing, as Drucker and others have pointed out, was that the Nazis feared that if their subject peoples developed a strong National Socialism of their own they would no longer be amenable to control and exploitation by the Nazis. They would use National Socialism or totalitarianism to free themselves from the Nazi yoke.

Rogge's theory of Nazi world revolution, endorsed by no authority on the subject of the Nazis, would fit better Russia and the Third International than the Nazis. Yet, at the moment of writing this book, authorities are sharply divided or largely uncertain about Russia in this connection. Many are inclined to the view that Soviet Russia does not want to set up communist regimes all over Europe and Asia at this time, if ever, since to do so might create a future peril for Russia and lessen the degree of influence and control she is now able to exert over a divided and largely demoralized Europe and Asia. In any case, as the ousting of Browder from the leadership of the American communists has shown, it would be difficult to convict communists throughout the world by showing that they had a publicly announced and consistently followed plan, such as Rogge alleged and tried to prove against the Nazis and the defendants in the Sedition Trial.

Briefly, if it were true—and there would be plenty of evidence if it were true—that a given group of individuals were acting under direct orders of a foreign government or political party, making out a case against them on those lines would be easy. But it would be absurd to try to prove a political conspiracy against either alleged communists or Fascists or Nazis mainly by analysis of their writings, utterances and political activities. Proof of any such conspiracy must take the form of evidence of membership or agency or that given persons acted under given instructions from given principals.

It is easy to theorize about what Stalin and the communists plan for the world. One school of authorities say one thing; another school of equally good authorities say the opposite. Such theses cannot be made the basis of criminal charges since they can never be proved. Hence the absurdity of the Sedition Trial, which only a singular lack of humor and philosophical insight on the part of the judge and prosecutor made possible.

Any one with a sense of humor and a knowledge of recent history would have said of Rogge's statement that the objective of the Nazi movement was to establish Nazism throughout the world, that Rogge flattered Hitler and the Nazis with a rationality they never displayed. Hitler might have been smart to have followed Rogge's plan for the Nazis. But he didn't or he wouldn't have attacked Russia and collaborated with conservatives like Petain.

Mr. Rogge:

For the purposes of this trial we are, of course, only concerned with what took place in the United States and only what the defendants in this case did in furtherance of the movement. However, we shall show you their connections with Germany and with other countries in order that you may see that they were interested in a world-wide movement and were not merely citizens expressing their views of local problems.

In our country every citizen, believing in our democratic form of government, has the right to criticize the President or the Congress and to ask that they do things in a different way than they are doing them. But there is a big difference between such a person and the defendants who, the evidence will show, were cooperating with people publicly known to be avowed Nazis or Fascists in Germany, in England, in Canada and in the Union of South Africa.

Comment:

All this sounds very terrible in time of war. But what does "cooperating with avowed Nazis and Fascists" mean? Were not the governments of the United States, Britain, France and Russia, each cooperating with them right up to the declaration of war? Relations which were lawful when had cannot be declared unlawful after the declaration of war by virtue of some sort of ex post facto theory.

Mr. Rogge:
The evidence will show, for instance, there was a Fascist organization in Canada headed by one Adrien Arcand. The evidence will show you the connections between the defendants in this case and the Canadian Fascist group. The evidence will show that in England there was a Fascist organization headed by Oswald Mosley. One of the leaders of the English group was Henry Beamish. About 1936 Beamish left England and went to the Union of South Africa where he carried on a Nazi program.

Comment:
The allegations in the preceding paragraph, the one in the last sentence alone, would call for testimony of an indefinite quantity about Beamish, without the presence of Beamish or his representatives to rebut such testimony. All this was utterly irrelevant to the charge of conspiring to cause insubordination in the armed forces except on Rogge's theory, proof of which would call for evidence the like of which he did not have and the presentation of which, if he had it, would have taken years. Of course, Rogge expected to involve all these leaders and agitators in other countries in his world plot by showing some one simple and normal contact each, or his group may have had with this country and one of the defendants. On this reasoning, if it can be shown that two or more temperance crusaders in different parts of the world exchanged pamphlets or that one of them addressed the meeting of the other, this would suffice to prove that they are linked in a common enterprise.

Mr. Rogge:
The evidence will show that Beamish was in personal and direct contact with Hitler and other leaders of the Nazi Party. He traveled about the world making contacts with groups which were part of the world-wide movement. In 1937 Beamish came to the United States. He addressed a meeting at the Hippodrome in New York on October 30, 1937, sponsored by the German-American Bund. The speakers at the meeting were Beamish, of the Union of South Africa, Arcand of Canada, and the defendant Robert E. Edmondson of the United States. These three persons were all talking at the meeting for one purpose, to spread the propaganda of the Nazi movement.

Comment:

The allegations about the meeting in question would require for their support evidence the presentation, cross examination and rebuttal of which might take a week or more. The meeting occurred three years before the law was passed. If it could be shown that at the meeting anything was said with intent to cause insubordination and calculated to create a clear and present danger of causing insubordination, such evidence might be relevant. Obviously, this evidence like the rest of Rogge's evidence had nothing to do with showing intent or clear and present danger in the matter of causing insubordination in the armed forces.

Mr. Rogge:

The evidence will show that the defendants were all part of the same movement with Hitler, Goebbels, Beamish, Arcand, Oswald Mosley, and many others.

Comment:

Evidence to show that those just named belonged to the same party or organization, if it existed, would not take long to present. The proposition that they were all part of the same movement is a conclusion or inference and largely a matter of what definition one gives to the term movement. It was not susceptible of proof for the purposes of establishing the existence of a criminal conspiracy, for which agreement and common intent are necessary.

Mr. Rogge:

In 1939, the defendant Joseph E. McWilliams organized the Christian Mobilizers in New York. He conducted his part of the movement mainly by speeches. In this respect the evidence will show that he was somewhat like Hitler. He was an orator and he held his audiences spellbound.

Comment:

Just how would the evidence show that McWilliams was like Hitler? Answer according to Rogge: Both were orators and both held their audiences spellbound. There are thousands of orators who can hold their audiences spellbound. What can such a similarity between two men who happen to be orators prove, beyond the fact that both are orators? How does this similarity contribute to proving that either Hitler or McWilliams conspired to cause insubordination in the armed forces?

Mr. Rogge:

His speeches were very much like the conspirator Hitler's.

Comment:

The authors express no opinion as to whether this statement was true or false. They merely say it was irrelevant and that, if true, it would take weeks to prove against opposition. It would be necessary to present a representative number of selections of Hitler's and McWilliams' respective speeches. The government would present selections to show similarities; McWilliams' counsel would present selections to show dissimilarities. What would such evidence prove of relevance to the charge? All political speeches by great orators are very much alike in many respects. This is guilt by similarity carried to the outer limits of the ridiculous.

Mr. Rogge:

This is not surprising, however, for he had joined the Nazi movement and was interested in the same goal as the conspirator Hitler. He talked about the coming revolution and about destroying the Democratic and Republican parties in this country.

Comment:

If Hitler and McWilliams talked about the coming revolution, that was no significant similarity. For the past two or three decades, all sorts of people from the extreme right to the extreme left have talked and written endlessly about the coming revolution. It would be hard to find in one of Hitler's speeches a passage calling for or referring to the destruction of the Republican or Democratic parties in this country or in one of McWilliams' speeches a passage calling for or referring to *lebensraum* or living room for Germany or the supremacy of the German race.

Mr. Rogge:

Both were rotten, according to him; both were useless.

He and his confederates were going to drive them both out and run this country the way Hitler ran Germany.

Just as the conspirators Hitler and Goebbels had said before, he, the defendant McWilliams, said that the only language the people to whom he appealed understood was the language of hate, and he was going to use it for the same purpose Hitler used it, namely to soften the existing social structure and bring about Nazism. He wanted men who would hate our present form of government and fight against it. He wanted to link, as the evidence will show, America's destiny with the destiny of the conspirator Hitler. He praised the conspirator Hitler as the greatest man who has lived since the time of Christ.

Just as the Nazis in Germany designed a new flag, so Joe McWilliams' Christian Mobilizers designed a new flag, one which was to rule over America when the defendant McWilliams and his crowd took over the White House, a flag which they hoped would take the place of the one designed in 1776 by Betsy Ross.

The defendant McWilliams and his Christian Mobilizers and the Bund held joint meetings. One such joint meeting was held on August 23, 1939 at Innisfail Park in New York. The speakers were Fritz Kuhn, Bundesfuehrer of the German-American Bund, the defendant McWilliams, Fuehrer of the Christian Mobilizers, and the defendant Deatherage, Fuehrer of the American Nationalist Federation, who was always desirous of combining the groups named in the indictment into a single organization so as to wield political power.

The evidence will show that those three speakers, Kuhn, McWilliams and Deatherage, talked of revolution and counter-revolution, and they talked of their goal.

At the end of the case the government is going to ask you whether the mass meeting, which the government will show through evidence, at which the defendant Deatherage talked about revolution and counter-revolution with the defendant McWilliams, and at which, the evidence will show, the flag of the Christian Mobilizers was the one which stood forty feet high on the platform, was held in co-operation with the Bund because the defendants Deatherage and McWilliams loved our democratic, representative form of government, or because they loved more the Nazi form of government which the Bund represented.

Comment:

Considering the specific nature of the offense charged—conspiracy to cause insubordination in the armed forces—this is rabble rousing argument and appeal to hysteria and irrationality at its worst. The political doctrines, however reprehensible of the defendants, were not on trial under this indictment, as the Court of Appeals made clear in its decision in the Dunne case where a conspiracy to violate the same law was charged. The only issue was one of fact: Was there conspiracy to cause insubordination in the armed forces?

The defendant McWilliams is described by Rogge a few times as a great orator. McWilliams was an orator and in demand at public meetings. He had given the subject of communism deep study and determined to combat what seemed to him to be a menace to our country, as well as internationalism, to which he was also opposed. So, in the autumn of 1939, he formed the organization called the Christian Mobilizers. For this organization he adopted an emblem, mentioned by Rogge, which was a huge white cross on a circular field of red surrounded by 48 white stars representing the states of the Union—an emblem that surely seemed both Christian and patriotic. McWilliams denied that he or his group ever thought of substituting this party emblem for the flag of the United States as Rogge charged. Certainly, there is nothing unusual about a political party or organization having an emblem. On most election ballots the respective emblems of the Republican and the Democratic parties, an elephant and a donkey, are printed in the appropriate places as a guide to voters. During the spring of 1940, wishing to run for Congress from the Yorkville district of New York City, McWilliams disbanded the Christian Mobilizers and organized the American Destiny Party. He retired from active political life in the fall of 1941, three years before this indictment was returned against him. He was not included or even mentioned in the first two indictments.

Without in any way passing judgment on McWilliams' ideas or activities, one finds it difficult to see just what there was un-democratic, un-American or contrary to our form of government in any person's organizing a new political party, adopting a party emblem, running for Congress on its platform or making a bid for the German-American vote in a district like Yorkville, New York City, which had a large German element. No doubt Rogge would have argued to the jury that it was evidence of evil or Nazi intent on the part of McWilliams to have sought the votes of the German-American Bund members in Yorkville. The late President Roosevelt received the official endorsement of the Communist party and the vote of its members, presumably without incurring thereby any responsibility for that party or its policies.

Mr. Rogge:

The defendant Deatherage, the evidence will show, was one of the principal leaders of the Nazi movement in the United States and one of the most outspoken. He helped other organizations in the Nazi movement. One of the organizations which he helped was the National Workers League in Detroit. The leaders of this organization were the defendants E. J. Parker Sage, William Robert Lyman, Jr., and Garland L. Alderman. The defendant Deatherage was a member of the executive committee of the National Workers League.

Like the other organizations named in the indictment, the National Workers League was a Nazi organization advocating that we adopt Nazism. In line with the Nazi propaganda plan for this country the National Workers League spread anti-Semitism and prejudice against the Negro.

Comment:

During the seven and a half months of trial the prosecution did not get around to presenting any evidence against defendants Lyman, Sage and Alderman or the National Workers League. The authors of this book have no facts on which to base an opinion as to the truth or falsity of Rogge's allegations about these defendants or this organization. And it is not the purpose of this book to state the case for any defendant. The authors merely remark in this connection the practical impossibility of sustaining with evidence for the purposes of conviction in a criminal case the allegations just made by Rogge about these defendants and this organization being Nazi. The whole issue turns on a definition of Nazism. These defendants denied that they or their organization were Nazi. Rogge said they were and that he could prove it. But there is no legal definition of Nazi or Nazism. Any dictionary definition makes Nazi and Nazism terms that can only be applied to persons or things officially linked with the National Socialist Workers Party of Germany. Here is all Webster's International Dictionary has to say in definition of the term Nazi:

> Nazi (German from *Nationalsozialistische Partei*): A member of the National Socialist German Workers' party of Germany; a Hitlerite.

This being the only authoritative definition of the term Nazi an American court or jury could properly follow, just how could Rogge's evidence, by any stretch of the imagination, have proved that the defendants and the organization named above were Nazi? Nazi, in Rogge's case, was a term he proposed to apply to all the defendants and make stick by dint of endless repetition. Rogge had the temerity to attempt in a criminal trial to create a new definition of a term, a definition no dictionary sanctioned. And the judge allowed him to carry on his attempt for seven and a half months. Among the results were what *The Washington Post* called in its editorial columns "A Courtroom Farce" and the death of a heart attack of the trial judge. Rogge tried to make the term Nazi fit the defendants. It was an improper undertaking, the dictionary definition of the term, the evidence and the charge of the indictment being what they were. An Act of Congress or a new dictionary might make the term Nazi mean any person or thing that was anti-Semitic. But no government prosecutor could create such a new definition by any quantity or quality of evidence or argument.

Mr. Rogge:

The defendant Sage, the evidence will show, described his system for infecting a person with hatred this way: He would work beside a man who was neither a Jew nor a Negro and sound him out. If the man appeared interested he would cultivate him, profess friendship, be overly pleasant to him. In due course, he would give the man some mildly anti-Semitic literature. Then he would gradually increase the dosage. He would give him literature against our leaders and against our present form of government, and he would feed the man continually more violent literature until he had finally converted the man to the Nazi cause.

Comment:

Seven and a half months did not allow time for the government to get around to evidence on the "Sage system." But granting that the evidence would have fully sustained the allegation that Sage preached race prejudice, how would this have proved either that Sage was a Nazi or that he was trying to cause insubordination in the armed forces? The explanation of this absurd contention, of course, is that the main purpose of the "people behind the Trial" was to get a court verdict confirming the proposition that race prejudice or anti-Semitism was the same thing as Nazism. Those "people" desirous of establishing such a definition should have addressed themselves to Congress or the dictionary makers! They should have asked Congress by law to declare all anti-Semites Nazis.

Mr. Rogge:

The Government will show you that that is the way the defendant Sage described his system.

The National Workers League collaborated with the Bund as did other defendants.

Just as the Nazis in Germany and the Bund and other organizations named in the indictment had publications, so the National Workers League had a publication, "*The Nationalist Newsletter.*" The National Workers League distributed its publication to the Bund and to other defendants, and received the Bund's publication, the *Weckruf,* and the publications of other defendants.

I have told you that the evidence will show that the Nazis in Germany used the German-American Bund to spread Nazism in this country, not only among Germans and persons of German origin but also among native Americans. The Bund cooperated with all Nazi and Fascist-minded groups in this country in any way which would further the Nazi goal of establishing Nazism here. Of course, in approaching native Americans, the Nazis did not announce immediately the object of their propaganda. The propaganda technique was to win over native Americans, susceptible native Americans, gradually. For that reason, the Nazis and the defendants, the evidence will show sought out people who had some one prejudice which was part of the Nazi ideology and sought to use that as an opening to infect such people and convince them that the answer to their troubles was Nazism.

We will show you that in line with this part of the Nazi propaganda technique, the Bund co-operated with the Ku Klux Klan. We will show you that the Bund and the Ku Klux Klan, held a joint meeting at the Bund's Camp Nordland in New Jersey on August 18, 1940. We will show you that the Bund, in discussing and commenting upon this meeting in its publication, the *Weckruf,* announced that the Bund's Camp Nordland was open to other "patriotic," in the sense they used it, organizations.

Comment:

The opinion of the Supreme Court, reversing the conviction of the twenty-four German-American Bundists, already referred to several times, completely disposes of the foregoing about associations between certain native American defendants and the Bund. Whatever such associations may have proved, they showed neither intent nor clear and present danger so far as causing insubordination in the armed forces was concerned.

CHAPTER XII.

PROSECUTOR'S OPENING STATEMENT (Continued).

Mr. Rogge:

The person who arranged the joint meeting of the Bund and the Klan was the defendant Edward James Smythe.

The defendant Smythe, the evidence will show, was another early collaborator with the Bund and with Nazis in Germany. He was a distributor of Nazi propaganda material which he received from Germany. He wrote to Germany that he would do his share.

He wrote that Nazism was Protestantism in action, the highest form of Christianity.

Comment:

It is interesting to note, in passing, that (1) defendant Smythe emphasized in his propaganda and activities the idea that he was a Protestant seeking to organize a Protestant group; and that (2) Adolf Hitler was baptized a Roman Catholic and never was known to have changed faiths. The trial, in its seven and a half months course, had not got around to defendant Smythe, except for the introduction of evidence that he had once attended, uninvited, a meeting of the German-American Bund, at which the Bund officials tried to keep him off the platform.

Mr. Rogge:

He said that the conspirator Hitler was a great Christian leader, the greatest Christian since Christ. He said that he looked upon the conspirator Hitler as the second Jesus Christ, and asked, in writing, "Where is the Hitler of America?"

The defendant Smythe did not have a real organization, but he had a letter head organization called the Protestant War Veterans.

Just as the other conspirators in the Nazi movement, the defendant Smythe used a high-sounding name for his letterhead organization in order to deceive the people he was trying to convert. The name, Protestant War Veterans, is one that would appeal to many people. We will show you, however, that this was not a real organization but merely a name used by the defendant Smythe and a few people who surrounded him.

The defendant Smythe had a small publication of his own which he labeled "*Our Common Cause,*" and he wrote for the publications of other defendants. One of the principal publications in which his articles appeared, was a paper published in Wichita, Kansas, called "*Publicity.*" The conspirator Elmer J. Garner was the editor of "*Publicity.*"

Comment:

It is worthy of remark, as a sidelight on the personality and character of prosecutor Rogge that in his three hour opening statement the only times he referred to any one of the thirty defendants in the case as a "conspirator" were when he mentioned the then deceased Elmer J. Garner.

Now it is neither legally permissible nor professionally ethical for a prosecutor to call a defendant a conspirator before the latter is found guilty, just as it would not be in a murder trial for the prosecutor to refer to the accused as the murderer. Well, it so happened that the one and only defendant Rogge singled out to call several times a "conspirator" was Elmer J. Garner, an octogenarian, who had died in his sleep, with only forty cents in his possession, just a few days before Rogge made his opening statement. Possibly, Rogge thought it was all right to call Garner a conspirator because Garner was dead and had no one in court to defend him. Rogge was, apparently, not one to be inhibited by such rules as *de mortibus nihil nisi bonum.* For Rogge, presumably, Garner's death before the selection of the jury was completed was the equivalent of conviction. This is just another piece of behavior which reveals the kind of man Rogge was.

Mr. Rogge:

The evidence will show that the Bund received the paper, "*Publicity,*" and sent its publication, the *Weckruf* to the conspirator Garner.

Comment:

Note Rogge calls the deceased Garner a conspirator the second time.

Mr. Rogge:

The evidence will further show that the defendant Smythe saw to it that the paper, *Publicity,* reached other Nazi agencies in this country. He arranged for it to go to the German Library of Information and the German Railroads Information Office, which the evidence will show to be two Nazi propaganda agencies in this country under the supervision of the conspirator Goebbels. The defendant Smythe also furnished the German Library of Information with names for its mailing list.

Other defendants who wrote for the paper, *Publicity,* at Wichita, Kansas, were the defendants Howard Victor Broenstrupp, Ellis O. Jones and David Baxter. The defendant Broenstrupp used the alias, Major General Count Cherep-Spiridovich. The evidence will show that later he promoted himself to Lieutenant General Cherep-Spiridovich. I don't know in what army he was supposed to be a lieutenant general, but it certainly was not in the Army of the United States. The defendant Broenstrupp was another early collaborator with the Bund and with Nazis in Germany. He claims to have cooperated both with the conspirator Hitler and with Mussolini in their movements and to have had direct contact with them.

From that and other evidence, the government will contend at the conclusion of the case that the propaganda which the defendant Broenstrupp circulated was in furtherance of the Nazi movement.

The defendant Broenstrupp worked closely in this country not only with the Bund but also with the defendants Pelley, Smythe, Edmondson, Eugene Sanctuary, and with other defendants.

The defendant Jones not only used the conspirator Garner's publication, *Publicity,* as one of his mediums for spreading Nazi propaganda, but he also had another one in Los Angeles.

Comment:

Note Rogge for the third time calls the deceased Garner a conspirator.

Mr. Rogge:

There he had an organization known as the "Friends of Progress." Associated with him were the defendants Robert Noble and Franz K. Ferenz. This organization carried on activities of its own in furtherance of the Nazi movement and cooperated with the Bund. The evidence will show that when our government finally closed the German Library of Information in 1941, the defendant Noble wrote to the German Library of Information congratulating them on their work and apologizing for the action of our government. The defendant Noble, at "Friends of Progress" meetings, the evidence will show, relied upon the conspirator Hitler's Mein Kampf.

The evidence will show that a few days after Pearl Harbor, the defendant Noble, at one of the "Friends of Progress" meetings, made the statement that Hawaii was not part of the United States and that the United States had not been attacked at all. Pearl Harbor, he said, the evidence will show, was nothing to get excited about. We should soon hear much more, he said. We would soon find out, according to him, what a good job the Japanese had done in the Pacific. The defendant Jones then got up and tried to demonstrate that Hawaii and the Philippine Islands were no part of the United States, but really belonged to the Japanese.

The evidence will show that these defendants, Jones and Noble, in the early days of 1942 did their best to persuade members of their audiences not to join our armed forces.

Comment:

No evidence to support the allegation in the preceding paragraph had been introduced before the end of the Trial.

Mr. Rogge:

In this, the defendant Ferenz aided them. The evidence will show that the defendant Ferenz was a Nazi propagandist who sold Nazi publications, showed Nazi films and took a prominent part in the activities of the Bund in Los Angeles. It was defendant Ferenz who wrote to Nazi propaganda agencies in Germany describing his efforts to further the Nazi cause in this country and asking for help from Berlin. He got it and the government's evidence will show you what it was.

Comment:

The "evidence" referred to in the preceding sentence had not been introduced by the end of the Trial.

Mr. Rogge:

The defendant Baxter also operated in the Los Angeles area. The evidence will show that he dealt directly with a Nazi agent named Kurt B. Prince zur Lippe and was in contact with the German consulates in Los Angeles and San Francisco. The defendant Baxter helped zur Lippe write a great deal of Nazi propaganda. For this work the defendant Baxter received his pay from the German Consul in San Francisco, the Nazi Fritz Wiedemann.

Comment:

Defendant Baxter was severed from the trial on the government's motion in the third month on account of deafness. No evidence against him had been introduced up to that time. His story was that he had rendered some services to Fritz Wiedemann in connection with the latter's study for a degree in a California university, for which he, Baxter, had received some fifty dollars compensation.

Mr. Rogge:

The defendant Baxter stated that he and zur Lippe were trying to get the people of California to see things the right way, the conspirator Hitler's way. He openly stated that he was a Nazi and an active propagandist for the Hitler ideology. With his Nazism he combined Fascism. In place of our democratic, representative form of government he wanted a Fascist state on the style of Italy.

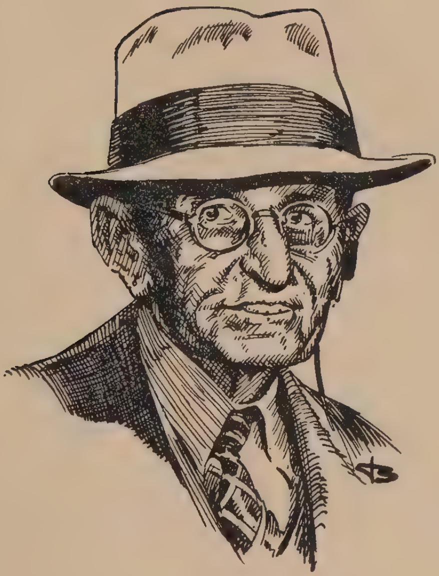
The defendant Baxter worked with the Bund, with the conspirator Garner. . . .

Comment:

For the fourth time the gallant Rogge calls the deceased Garner "conspirator." What reason could Rogge have had for properly calling Baxter "the defendant" and improperly calling Garner "the conspirator" in the same sentence, except the facts that defendant Baxter was living and represented in the court room while the late defendant Garner was dead and had no one to speak for him in the court room?

Mr. Rogge:

The defendant Baxter worked with the Bund, with the conspirator Garner, with the defendants Smythe, Pelley,



"For the fourth time the gallant Rogge calls the deceased Garner 'conspirator'." Elmer J. Garner, of Wichita, Kansas, a publisher all his life, four score and two, weighted down with the infirmities of old age, died in his sleep one week after the Trial opened, with forty cents in his pocket.

Edmondson, Eugene N. Sanctuary, Charles B. Hudson, Frank W. Clark and with other defendants.

The evidence will show that the defendants, especially in the earlier days, did not usually deem it advisable to admit that they wanted to change our form of government. Very often the aims which they expressed in their publications concealed their true aim. Following the propaganda technique which the conspirator Hitler laid down in his book *"Mein Kampf"* they believed that propaganda must serve their own purposes and that the way to serve their own purposes was to cause a breakdown of the existing system.

Comment:

Having in mind the standard of "clear and present danger" repeatedly insisted on by the Supreme Court in reversing recent judgments in civil liberties cases, five of which we have repeatedly cited in this book, how can any sensible person consider anything the defendants named by Rogge may have said or done as having been calculated to cause a breakdown of the existing system? The charge, under the law, of course, could not be conspiring to cause a breakdown of the existing system, whatever that might mean. As for the rise of the Nazis to power in Germany, the consensus of authoritative opinion is not that the Nazis ever caused the breakdown of the system existing in Germany before they came to power, but that that system broke down for numerous and different reasons for which the Nazis had little or no responsibility. The Nazis merely took advantage of the current situation in 1933 and the weaknesses inherent in the system.

Mr. Rogge:

Accordingly, they engaged in a mass-propaganda campaign designed to dilute the strength of a free people, to impair our faith and the faith of our armed forces in our public officials and in our form of government, to make us so confused, distrustful and apathetic that we would be unwilling to defend our form of government.

Comment:

There can be no freedom of speech or of political opposition if it is a crime to impair the faith of our people in our public officials or in our form of government. To say that the Nazis ever made the German people apathetic, is about the silliest statement that could be made about the Nazis. So it is to say that their propaganda made the German people unwilling to defend Germany. As for defending any existing form of government, there was no law in Germany and there is none in America compelling the people to defend their existing form of government against any amount or kind of change that can be carried out in a lawful manner. On this point Rogge continuously confuses the issue and misstates the law. The law on this point we have made clear, as laid down in the Dunne case. There is no court decision to support Rogge's legal theory that it is a crime to impair faith in our public officials or form of government, unless this be done with some unlawful intent such as causing a violent overthrow of the government or insubordination in the armed forces.

Mr. Rogge:

They engaged in a mass propaganda campaign spreading hatred against the Jews, prejudice against the Negroes, fear of the communists and distrust of our public officials.

Comment:

The preceding sentence once again sums up the purposes behind the Trial. Why does Rogge nowhere say the evidence will show that the propaganda and the intent of the defendants created "a clear and present danger" of causing insubordination in the armed forces? No other proof could sustain a conviction under the indictment.

Mr. Rogge:

Actually, in order to destroy the faith of the people in a democratic representative form of government, it is necessary to attack many things. But the conspirator Hitler, in his book "*Mein Kampf*," in laying down the rules for a mass propaganda campaign, stated that if a Fuehrer once admitted that he had many different kinds of opponents, the people might begin to doubt that he was right and all his opponents wrong, and might not be converted to the cause.

Different opponents, the conspirator Hitler says, must be made to appear as if they belonged to one common category. That one category was the Jews. Accordingly, the defendants, just as the Nazis had done before them in Germany, attacked the Jews and sought to identify them with the Communists. Accordingly, the defendants, just as the Nazis in Germany had done before them, called the international bankers, Jews; and they called all Jews Communists, which, I pointed out this morning, makes international bankers Communists, when, of course, they are just the opposite. To the defendants that could make no difference. The Nazis said that made no difference. If we were unable to stop and notice the inconsistencies in their propaganda, then they were accomplishing their purpose.

Just as the Nazis had done before them in Germany so the defendants in this country tried to center our attention on the Communists. They described to us the horrors of a Communist revolution and spread propaganda that the Communists were trying to take over the United States. Of course, merely spreading propaganda that the Communists were trying to take over the United States was not enough to win converts to Nazism, for the American people were confident that their own form of government was perfectly able to cope with the efforts of any Communist group. So the defendants, when they thought that they had built up a sizable amount of hatred against the Jews and when they thought that a considerable number of people had been educated to what they called the danger of a Communist revolution, they went further and accused many of our public officials of being Communists or Communist-controlled, so as to make the people afraid of their own public officials.

The defendants attacked our public officials in the same way that the Nazis had attacked the leaders of the Weimar Republic. They published and distributed large quantities of propaganda attacking the motives of our public officials, accusing them of corruption, of plotting to further their own ends at the expense of the American people and at the expense of our armed forces, of selling out both to international bankers and to Communists, of representing the interests of the alleged international groups for which the defendants asserted our public officials were merely puppets, and accusing many of them of being Communists themselves. They declared in their propaganda that the whole democratic representative system of government in the United States was rotten, corrupt and about to fall.

Comment:

Interrupting for a moment Rogge's flow of irrelevant argument, the authors deem it pertinent to interject a few words of wisdom and relevancy from the decision of the United States Supreme Court of June 12, 1944, reversing the conviction of Elmer Hartzel of having violated the Espionage Act of 1917 in that he wilfully attempted to cause insubordination, disloyalty, mutiny and refusal of duty in the armed forces and wilfully obstructed the recruiting and enlistment service of the United States (*Hartzel* v. *U. S.*, 320 U.S. 756). The ground of the reversal was not a point of law but the fact that the evidence was insufficient to prove the charge. The point to calling attention to this decision in connection with a reading of Rogge's statement of the intemperate utterances he proposed to prove the defendants had made is to show that Hartzel's utterances were similar. In fact, they were more extreme than those of the defendants in this case. Yet the Supreme Court held that:

> An American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective without running afoul of the Espionage Act of 1917.

The Supreme Court had the following to say about Hartzel which should be carefully pondered by the reader in conjunction with what Rogge has to say against the defendants:

> Prior to the entry of the United States into the present war, petitioner wrote several short articles containing scurrilous and vitriolic attacks on the English, the Jews and the President of the United States. Americans were urged not to ally themselves with the English. Only a German victory, it was said, would bring "increased stability and safety for the West." . . . Petitioner then wrote three articles in 1942 which formed the basis for his conviction under the Espionage Act of 1917. These articles repeated the same themes and were marked by the same calumny and invective; they are set out at

length in the opinion of the court below, and need not be repeated here. In substance, they depict the war as a gross betrayal of America, denounce our English allies and the Jews and assail in reckless terms the integrity and patriotism of the President of the United States. They call for an abandonment of our allies and a conversion of the war into a racial conflict. They further urge an "internal war of race against race" and "occupation [of America] by foreign troops until we are able to stand alone."

Yet in that case the Supreme Court found the evidence did not sufficiently show "specific intent" "to cause insubordination or disloyalty in the armed forces or to obstruct the recruiting and enlistment service"; and that the evidence did not sufficiently show "a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent." The Supreme Court further said:

> There is nothing on the face of the three pamphlets in question to indicate that petitioner intended specifically to cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces or to obstruct the recruiting and enlistment service. No direct or affirmative appeals are made to that effect and no mention is made of military personnel or of persons registered under the Selective Training and Service Act. They contain instead, vicious and unreasoning attacks on one of our military allies, flagrant appeals to false and sinister racial theories and gross libels of the President. Few ideas are more odious to the majority of the American people or more destructive of national unity in time of war. But while such iniquitous doctrines may be used under certain circumstances as vehicles for the purposeful undermining of the morale and loyalty of the armed forces and those persons of draft age, they cannot by themselves be taken as proof beyond a reasonable doubt that petitioner had the narrow intent requisite to a violation of this statute.

The reader is asked to keep in mind the above quoted dicta of the highest tribunal in the land in reading and judging Rogge's opening statement in which he says that the government's evidence will show that certain defendants said many intemperate and vicious things exactly as Hartzel was shown to have written. The reader is also asked to keep in mind that Rogge's opening statement does not say that his evidence would show that all or most of the defendants either uttered or endorsed all the wild utterances he attributed to some of them. Rogge, of course, thought he could apply to everyone he had defined into his mythical political movement the principle of conspiracy law which says that in any conspiracy the crime of one is the crime of all. This is why he stressed throughout the Trial his concept of a Nazi world-wide movement, which he insisted all the defendants had joined. As far as he was concerned, this movement was the conspiracy. Therefore, everyone whom he placed in this movement, by the simple process of definition of the movement, was responsible for every act and utterance of everyone else he defined into the movement. As he defined Hitler and all the Nazi leaders and party members into this world movement, all the defendants were, under the just-stated principle of conspiracy law, guilty of every crime Hitler or any of the Nazis had committed in furtherance of the movement.

Mr. Rogge:

The evidence will show that in seeking to identify our public officials with Communists, the defendants again followed the propaganda technique which the Nazis in Germany had used before them to destroy the Weimar Republic. They called all Jews Communists and then not only looked for any Jew occupying a responsible position in our Government, but also called various of our public officials Jews whether there was any basis for the statement or not.

For instance, the evidence will show that they pointed out that Supreme Court Justice Louis Brandeis was a Jew, and then called him a Communist. The fact that Justice Brandeis was appointed to the Supreme Court in 1916, before the Communist revolution even began made no difference to the defendants, for to Nazi propagandists the truth is totally immaterial.

The defendants, of course, made no attempt, no effort to determine whether there were any particular Jews who were Communists, but were satisfied to classify all Jews as communists.

In trying to determine who were the Jews in the Government they simply went through lists of Government officials and employees and took all the names which sounded to them like Jewish names. The absolute insincerity and lack of any desire for proof in their propaganda is indicated by their method of choosing people to be attacked. It was only natural that people whom they attacked as Communists and Jews, without any foundation, often turned out to be neither Jewish nor Communists.

If one applied the system of the Nazis and the defendants to the Nazis themselves, one would come out with the result that Alfred Rosenberg, a top Nazi conspirator, to take one example, was a Jew.

Comment:

How far removed is all this argument—for it is not a proper legal opening statement—from the issues of intent and clear and present danger in connection with a charge of conspiracy to cause insubordination in the armed forces!

Mr. Rogge:

By 1936, the defendants became bold enough to refer to President Roosevelt as a Jew. The first of the defendants to make a determined effort with this propaganda was the defendant Gerald B. Winrod. In his publication "*The Revealer*" for October 15, 1936, he printed a genealogical chart of the President, showing his descent three hundred years ago from a Dutch family in Holland.

Comment:

Note that the alleged publication by defendant Winrod is said to have come out in 1936, nearly four years prior to the passage of the law under which the indictment was brought. Such things as the statute of limitations and the fact that the law under which the case was being tried was passed four years later did not bother Rogge. He undertook to prove what had happened, why and how as far back as 1919. He undertook to prove that anything any one of the defendants had ever said or done in furtherance of the alleged movement was attributable to all the defendants.

Mr. Rogge:

Because some of the President's ancestors were Jacob, Sarah and Samuel, the defendant Winrod drew the conclusion for his propaganda purposes that the President was a Jew and labelled the genealogical chart "Roosevelt's Jewish Ancestry."

This was the extent to which the defendants, the evidence will show, went in their propaganda.

Comment:

But what had it to do with causing insubordination in the armed forces? How did the utterance of any such statements about President Roosevelt's ancestry involve any of the defendants who were not responsible for it?

Mr. Rogge:

They talked about the terrible Communist revolution in Russia. They talked about the number of people who were killed, then they said that the Communist revolution was inspired by the Jews, that all Jews were Communists, that President Roosevelt had a second cousin named Jacob, and that, therefore, the President was a Jew-Communist.

By such propaganda the defendants hoped to make people hate our democratic representative form of government and to support Nazism as the only way to save our country from a Communist revolution. By such propaganda the defendants hoped to make us believe that it was necessary for them, the defendants, in order to protect us from Communism, to depose our President and to institute Nazism.

The defendants in carrying on their mass propaganda campaign, not only received suggestions from the Nazis, not only studied and followed the tactics which the Nazis in Germany had used before them, but they also obtained the materials for their propaganda campaign directly from Germany. By being ready and willing converts to the Nazi cause they obtained literature from various Nazi propaganda agencies. Their contacts, however, were not limited to receiving literature from Nazi propaganda agencies. They had contacts in this country with the leaders of the German-American Bund, and with members of the German Embassy and the German Consulates, and in Germany they had contacts with various other Nazi conspirators.

The evidence will show that some of the defendants went to the German Embassy and others of the defendants went to the various German Consulates in this country. At the Embassy and at the Consulates they were advised by members of the Nazi party how the Nazis carried on their propaganda in Germany to establish Nazism there. The defendants obtained such information in order that they might do the same thing in the same way in this country. Some of the defendants went to Germany and learned at first hand how the Nazis came to power there. Among these were the defendants, Kunze, Schwinn, Winrod, Elizabeth Dilling, Lawrence Dennis, George Sylvester Viereck and Ernest F. Elmhurst.

Comment:

Imagine anything as normal and presumably innocent as a trip to Europe, including Germany, being offered to a jury as evidence of participation in a Nazi conspiracy! As for going to Germany to learn how the Nazis came to power, how ridiculous! All that any non-German-speaking American could learn in a month's visit to Nazi Germany about how the Nazis came to power there could be learned much better from books in his local library.

Mr. Rogge:

The propaganda theme of the defendant Winrod, that President Roosevelt was a Jew, was spread throughout the world by the Nazis and by the defendants in this case. The defendant Winrod's publication *"The Revealer"* with the genealogical chart and the defendant Winrod's caption "Roosevelt's Jewish Ancestry" was quoted and reprinted in such Nazi publications as *"Der Stuermer"* and *"Welt Dienst"* or *"World Service."* The genealogical chart with the defendant's Winrod's caption was reprinted by the defendant Edmondson in the form of a bulletin, of which he put out hundreds of thousands of copies.

The circulation of the defendant Edmondson's bulletin was great in Germany. The evidence will show that the very chart which the defendants Winrod and Edmondson used in this country was used in Germany to show the German people that the Americans were about ready to adopt Nazism.

All of the defendants used the propaganda theme of the defendant Winrod. They played up this theme of President Roosevelt's Jewish ancestry in various forms and continued using this theme right up until the time the indictment in this case was filed. Shortly prior to Pearl Harbor the defendant Lyman, who was one of the leaders of the National Workers' League in Detroit, along with the defendants Sage and Alderman, had a new version of the theme. He distributed a bulletin which had printed on one side the same genealogical chart which Winrod first used in 1936, and on the other side a cartoon depicting President Roosevelt as having pronounced the unlimited emergency in which our country found itself for the benefit of the Communists and the Jews.

The defendants were attempting to come to power in this country, the evidence will show, the same way the conspirator Hitler and the Nazis came to power in Germany.

Comment:

We call attention to Rogge's repetition of the statement that the evidence would show that the defendants were conspiring or attempting to come to power in this country "the same way the conspirator Hitler and the Nazis came to power in Germany." The defendants, with two or three possible exceptions, had not the slightest idea how the Nazis came to power in Germany. And no group could have followed the same pattern in this country however much its members might have wished to do so. The situations of the two countries were too utterly different. Similarities there will be, of course, between any two or more types of advocacy of political ideas and causes. The activities of the defendants undoubtedly bore some similarities to those of the Nazis. But they bore more similarities to the political activities of numerous American parties and groups, not excluding both major parties. Let the reader try to think up as many things as he can that the Republicans, the Communists and the Democrats say and do in common in a political campaign. The list will be larger than the list of the similarities Rogge promised to show between the Nazis and the defendants. Similarities in the use of techniques or ideas do not prove that two groups or parties are alike or that they are in confederation.

Mr. Rogge:

They hoped by attacking the President and other public officials of our Government, to weaken our entire social structure so that it would disintegrate and permit them to establish a new form of government in accordance with the conspirator Hitler's new world order. They could not, of course, foresee the exact manner in which they would bring about this result, but they did believe that if they could cause confusion in the minds of our people and get groups fighting against groups, race against race, class against class, each accusing the other of plotting to control the Government for its own ends, that they then would finally triumph. We will show you evidence of the various steps they took in their attempt to bring about this result.

One step was to prepare an underground army of Storm Troopers, Silver Shirts, White Knights, Socis and others, who could take over the Government by a march on Washington.

Comment:

In the above passage contradictions and absurdities pile one on the other. In one breath Rogge says, "The defendants were attempting to come to power in this country the same way the conspirator Hitler and the Nazis came to power in Germany." In the next breath he says that they were preparing "an underground army of Storm Troopers" "who could take over the government by a march on Washington." Nothing could be more demonstrably false than the statements that the Nazis came to power by a march on the German capital, that the Nazi Storm Troopers were an underground army, or that there was anything of an underground nature about the defendant organizations named by Rogge and in the indictment. Some of these organizations doubtless had the element of invisibility, but this was not because of their being "underground." It was only due to their being inexistent except on paper.

Mr. Rogge:

Now as I have told you, we have long had a statute which makes it a crime to advocate overthrowing the government by force and violence. But the defendants denied that they were going to use force and violence, which the Nazis denied doing in Germany.

As I have already stated, the defendants were part of a world-wide Nazi movement and in their efforts to establish Nazism here they used the same methods which the Nazis had used successfully in Germany. The defendants had the advice of the Nazis as to how they came to power in Germany, and pursuant to that advice, they were using the same methods here. The defendants—the Nazis tried to use force and violence in Germany when they began, and they failed. Thereafter in Germany, their method was by propaganda to impair the faith of the people and the armed forces in their own form of government in order to soften them up for the psychological moment when the Nazis would take over.

Comment:

As already explained, the chief method by which the Nazis came to power was that of inducing the German army from Field Marshal von Hindenburg down to call the Nazis to power, in a perfectly constitutional manner, in the belief that the only alternative to a Nazi government was a communist government and that Nazism was preferable to communism. Hitler won over the army and the industrialists and a larger percentage of the masses or of the voters than any other party could muster. In America there could be no question of following the Nazi method as regards the army since the army does not occupy here the same legal position it had always enjoyed in Germany and as it held with Hindenburg in the Presidency of the German Republic. At all events, Hitler's success with the German army involved in no way a violation of the law under which the indictment was brought or of any German law against causing insubordination in the armed forces. Quite the contrary. Hitler became the favorite of a majority of the German army leaders because the Nazis stood for discipline and military morale, not because he stood for insubordination, bad morale, disloyalty and mutiny on the part of the armed forces.

Mr. Rogge:

When the defendants prepared their underground army to take over the Government they contended that they were doing it within the law because they called it a counter-revolutionary move.

Comment:

Again we call the reader's attention to Rogge's repeated use of misrepresentation of what his own evidence would show. Whatever his evidence was supposed to show, it did not in a single instance tend to prove anything of an underground nature about any organization named by him. His use of the adjective ''underground'' is wholly unwarranted and contradicted by the nature of such evidence as he promised or presented as to the different groups or organizations of certain defendants.

As for the statement that the defendants prepared their organizations or groups to take over the government, it can only be remarked that if any defendant had in mind doing any such thing with the group he was organizing or trying to organize, he should have been subjected to a mental test instead of being put on trial for conspiracy to take over the government by means of causing insubordination in the armed forces. The point here made is not only an observation of common sense but also a statement of a sound legal principle. The two governing legal principles for this case are, as already stated, intent and clear and present danger. There could be no clear and present danger from the activities of any defendant who organized a group with the idea that he was forming an underground army to take over the government as the Nazis had done, that is, no clear and present danger that he would take over the government or that he would win over enough of the armed forces to take over the government. Of course, if any defendant's group did anything that affected any soldier's loyalty so as to cause him to be insubordinate, that act could and should have been denounced and punished under the Law of June 28, 1940. Rogge alleged and offered to prove no such act. He merely alleged that they were conspiring to take over the government by talking anti-Semitism and other bad ideas in a way intended and calculated to cause insubordination in the army. To that allegation the principle of clear and present danger certainly applied with all possible force.

Mr. Rogge:

They argued that the Communists were going to take over the Government. If the Communists did take over the Government, there would, of course, be no democratic government. Then the defendants would come in and depose the Communists. Of course, there was no assurance that the Communists would ever reach the stage of taking over the Government, so that the next step was to convince the people that the Communists were about to take over the Government. This alleged danger, the defendants told us, would justify them in moving in to forestall such an eventuality. Under the guise of protecting the country from a Communist revolution, the defendants would take over the country and we should end up with a Nazi or Fascist revolution.

Comment:

For the moment, let us waive any issues of fact so far as the evidence promised in the above passage may be concerned, and let us consider the question whether any person with common sense or a sense of humor could have talked seriously about the defendants conspiring to take over the country or the government, either from the communists or the existing authorities. Granting that any defendant talked or thought as Rogge alleged, did such talk warrant such activities as the defendant indulged in being made the subject of such a charge?

Mr. Rogge:

In Germany the underground army of Nazi Storm Troopers was a constant threat to the Republic, but the Republic did not compel the dissolution of the Storm Troopers because the Nazis did not openly advocate the use of their Storm Troopers against the Republic, and did not openly advocate violence.

Comment:

In the above passage the authors of this book wish merely to single out the word "underground" for denunciation. Whatever the army of Nazi Storm Troopers was, it was never in any reasonable sense of the word an "underground" army before Hitler came to power. The Storm Troopers wore uniforms that made them conspicuous. They paraded and appeared in public. For aught we know, Hitler may have had some secret or underground workers during his rise to power, but the Storm Troopers were anything or everything but "underground." Yet Rogge had no scruples as to the use of the adjective underground any more than he had about misstating some of the most incontrovertible facts of history. Rogge, apparently, thought "underground" was a good adjective to throw in with a view to confusing and prejudicing the jury; so he threw it in. There was about as much ground for calling the Nazi Storm Troopers an underground movement as there would be for calling the Salvation Army or the American Legion an underground movement. If Rogge had said that Hitler's Storm Troopers indulged in acts of violence and intimidation against the Jews, the communists and the Social-Democrats, he would have been correct. If he had said that Hitler's Storm Troopers indulged in such acts against members of the armed forces or that the Storm Troopers tried to induce the members of the German army to be insubordinate, he would have had no support from any known historians or records that the authors of this book can recall. The Nazis may go underground in Germany after this war. But they were never an underground movement at any time from 1923 on. Even before 1923 they could hardly have been called an underground movement.

Mr. Rogge:

When the Nazis had disrupted the Republic and had won over a portion of the army to Nazism so that it would not assist in the defense of the Republic, President Hindenburg had no recourse but to appoint Hitler to the Chancellorship.

The Nazis themselves, the evidence will show, say that when President Hindenburg became convinced of what had happened in Germany, he had no course left but to appoint the conspirator Hitler. The Nazis had so destroyed the social structure in Germany, and they had to such an extent undermined the loyalty of the Reichswehr to the Republic that if the President had wanted the Reichswehr to put down the Nazis the Reichswehr would have refused to act.

Comment:

We have already, on pages 148-151 shown how contrary to the consensus of historians is this version of the Nazi rise to power. We now offer in further refutation of the government's thesis the testimony of its own star German witness, Dr. Herman Rauschning, on cross-examination by defendant Dennis (page 12953 of the Record):

> Q. Well, now, I read you from page 1887, a statement of the prosecutor that "The Nazis had destroyed the social structure in Germany, and they had to such an extent undermined the loyalty of the Reichswehr to the Republic that if the President had wanted the Reichswehr to put down the Nazis, the Reichswehr would have refused to act."
>
> Do you believe the Reichswehr would have refused to put down the Nazis if Hindenburg had ordered them to do so?
>
> A. If Hindenburg would have ordered, I think the Reichswehr would have followed.

Thus the government's own witness contradicted Rogge. Page 12959 of the Record:

> Q. Now, coming back to the word coup d'etat, would you say it was a coup d'etat when Hindenburg made von Papen Chancellor?
>
> A. No. It was in the framework of the Weimar Constitution for times of danger and public unrest.
>
> Q. When he chose von Schleicher, was that a coup d'etat?
>
> A. No.
>
> Q. When he chose Hitler, was it a coup d'etat?
>
> A. In my opinion no.
>
> Q. The designation of Hitler was within the framework of constitutional procedure, is that correct?
>
> A. Under the special circumstances of the great crisis, it was in the line of the Constitution.

And defense counsel St.George elicited from Dr. Rauschning the admission that Hindenburg was not afraid of Hitler, and that if the Reichspresident had ordered Hitler shot, the Reichswehr would not have hesitated to execute the order.

The authors of this book renew their challenge to the government or any reader to find a single published book on the Nazi revolution or on the period of German history in question which corroborates Rogge's historical thesis, which was the keystone of his case.

The authors of this book offer no historical thesis of their own. Their only thesis and their only burden of proof in this book is to show that the prosecution case was not susceptible of proof. Both authors of this book, cross-examining government witnesses, forced them to testify in flat contradiction of Rogge's historical thesis. If their turn had ever come to put in a defense, they would have presented endless books and several historical experts to contradict Rogge's thesis, just as Rogge's own witnesses contradicted it. They would not have undertaken to prove anything other than that the government's allegations were unfounded, not susceptible of proof and, in large part, contrary to the consensus of historical opinion. Rogge posed a long series of affirmatives. He had the burden of proof. His own witnesses contradicted him.

Mr. Rogge:

The Nazi Party came to power in Germany, although it never received a majority of the votes of the people.

Comment:

This is another example of making tricky and misleading statements about history. It is true that up to the time Hindenburg called Hitler to form a government the Nazi Party had never received a majority of the total vote cast either for the election of members of the Reichstag or of the Reichspresident. But it is also true that no other or preceding government in Germany under the Weimar Republic or under the Kaiser's Reich had ever been formed by a single party which had received a majority of the votes. German governments since time immemorial had been coalition affairs, exactly as in France and most Continental countries under parliamentary government. There are few nations which, like America and Britain, have a two party system of government in which governments normally come to power as a result of a majority of the votes of the people for one party. In the elections before the Nazis came to power and in the first election after Hitler was made Chancellor the Nazis had a plurality but not a majority of the votes cast. Thus, exactly as Emil Ludwig stated, as quoted on page 151, no government that ever came to power in Germany ever had a better legal title than had the Naxis. And Rogge's best German expert witness, Dr. Rauschning, confirmed this on cross examination by the authors of this book.

Mr. Rogge:

Along with the conspirator Hitler, some other Nazi leaders were appointed to high places in the Government. No sooner had the Nazis consolidated their position than they issued a series of decrees abrogating civil liberties, abolishing representative government, prohibiting all other political parties, and setting up a complete totalitarian state.

The defendants in this case had the same plan in mind.

Comment:

No allegation in Rogge's entire opening statement was more unprovable and ridiculous than the last statement quoted above.

In the first place, the procedure by which the Nazis came to power and, after having received from President Hindenburg power to decree emergency edicts with the effect of law, further consolidated their legal and de facto position through a series of Presidential and cabinet decrees, was one which could not possibly be followed in the United States for the simple and sufficient reason that the American Constitution contains no such provision as Article 48 of the German Constitution, already quoted on Page 170.

In the second place, it was brought out by cross examination of government witnesses, hostile to the defendants, that most of the defendants were as ignorant of the procedure by which the Nazis came to power and consolidated their position as was Rogge.

Of course, the essence of Rogge's idea of using German history to convict the defendants was to show that the Nazis came to power by using anti-Semitic propaganda, whereupon they did terrible things, which, according to him, was exactly what the defendants were planning to do. But he committed himself again and again to the proposition that the defendants had conspired to use the same plan the Nazis used. Obviously, neither propaganda nor anti-Semitism is a plan. They are only instruments that may be used in a plan. The Nazis had followed a plan. But it was a plan that was both legal in Germany and impossible to follow in America. Why do we give so much space to showing that the Nazi plan was legal and practical in Germany but not in any way practical for America? The answer is that Rogge relied entirely on this plan to link the defendants with each other and with a conspiracy to violate the law as charged. He was forced to rely on some such device simply because he had no evidence in the words or acts of the defendants by which to link them in intent to cause insubordination in the armed forces. Rogge doubtless knew the truth of the aphorism of Montaigne that men are most apt to believe what they least understand. He probably figured that as no one would understand his case, everyone would believe it. But the authors of this book understood it before he started his opening statement, and they knew that no one who either understood the case or was made aware he did not understand it would believe it.

Nothing in the government's evidence showed or even suggested that any defendant ever contemplated following the Nazi plan or even knew what it was. Dr. Kempner, one of Rogge's star witnesses, who had been a German official in the Ministry of Justice, on cross examination by defense counsel St.George, acknowledged that he had aided Rogge in the preparation of the case for months before the return of the third indictment. He did his best to bolster up Rogge's thesis. But he had to admit that if the defendants were to follow Hitler's plan for coming to power they would need not only Article 48 of the German Constitution, the like of which does not exist in our American Constitution, but they would also have to have the disorders both political and economic which prevailed in Germany during the depression years 1929-1932, a President favorable to them, an army backing up the President, as well as the great industrialists, the millionaires and the masses. What is the sense to talk about a conspiracy to seize power in connection with a party which has all those factors at its command?

Mr. Rogge:

By a mass-propaganda campaign, by appeals to members of our armed forces designed to make them disloyal to our democratic representative form of government, the defendants hoped to bring about a Nazi revolution in the United States in the same way that the Nazis had done in Germany.

Comment:

It is to be carefully noted in the above passage that Rogge charges the defendants with having disseminated propaganda "designed to make" the members of the armed forces "disloyal to our democratic representative form of government." This is his stock formulation which does not fit the law under which the case was being tried. It is an intellectually dishonest formulation susceptible of almost any farfetched interpretation the maker may wish to give to the term "democratic representative form of government." To show the absurdities implicit in such tricky uses of terms like "democratic," we quote the following from Lawrence Dennis' cross-examination of Dr. Rauschning, page 12, 984 of the Record:

> A. He (Hitler) promised them, the generals, a disciplined army and a disciplined nation.
>
> Q. Did he promise anything else?
>
> A. Oh, yes. On the other hand, he undermined the obedience and the creed of the younger officers, and of the privates and of the non-commissioned officers.
>
> Q. How?
>
> A. In promising them, under him, a new and better advancement and socially equal position with the old, established officers.
>
> Q. Now, I understand from that statement that it is your understanding that Adolf Hitler's political promises to the under officers and men constituted a solicitation to mutiny and insubordination?
>
> A. That is true.
>
> Q. And on the other hand, and at the same time, he appealed to their generals for support, because he told them that he would furnish discipline and order?
>
> A. That is correct.

Note well that Dr. Rauschning, in an attempt to sustain the prosecution theory, said that Hitler won the generals of the German army by promising better discipline for the army and that Hitler won the men by promising them social equality with the officers, which, Rauschning stated, was the same thing as undermining the morale and loyalty of the armed forces. Well, if promising the privates of the army social equality with the officers constitutes the offense of undermining the loyalty of the army to "our democratic representative form of government'' then anything goes in the way of proving the crime of causing insubordination in the armed forces. And if one holds, as did Rauschning to bolster up Rogge's absurd case, that Hitler's promises of social equality to the German enlisted men constituted solicitation to mutiny and insubordination, then the sky is the limit for absurdity. The very suggestion that Hitler's propaganda could be associated with solicitation to mutiny and insubordination of armed forces is too silly for serious consideration.

Rauschning was telling the generally recognized truth when he said that Hitler won the officers of the German army by promising better military discipline and the enlisted men by promising a new and better advancement and social equality. But when Rauschning, under oath, said that Hitler's promise of social equality and better advancement to the enlisted men constituted a solicitation to mutiny and insubordination, he was giving the only answer that would sustain Rogge's theory and an answer that no rational person could consider as anything but preposterous. Such was the nature of Rogge's case.

In this connection, while we are on the subject of what constitutes undermining the loyalty of the armed forces and whether Hitler built up his regime by causing insubordination among the German armed forces, it is not amiss to call attention to the United Press report of June 26, 1945 that the most famous cartoonist of the war, Private William Mauldin, stated that General Patton had called him up on the carpet about his cartoons appearing in *Stars and Stripes.* The general told Mauldin that his cartoons were undermining the morale of the Army, were destroying the confidence of the men in the command and were making soldiers unsoldierly. According to Mauldin, Patton said that the cartoonist was blowing off steam for the soldiers and was giving them an outlet for their emotions. And, according to Mauldin, Patton said that soldiers should not have steam let off for them or have an outlet for their emotions. When General Patton was questioned by the United Press about Mauldin's statement, the general merely said that Mauldin's statement was ''just one of those mosquito bites you are bound to get,'' and declined to make any comment further about Mauldin.

The point we wish to stress is that almost anything in the way of criticism, grousing or advocacy of social change can be held to have a tendency to undermine the morale of the armed forces. Rauschning thought Hitler's promises to the German privates of advancement and social equality constituted undermining their loyalty to the German democratic government. General Patton thought cartoonist Mauldin's cartoons undermined the morale of the American army. Neither the American nor the German soldiers fought in this war like men who had had their morale badly tampered with. Hitler's crimes were many, but causing insubordination in the armed forces was not one of them.

Mr. Rogge:

In wishing to oust President Roosevelt the defendants did not wish to continue our form of government under a new president, but, as in Germany, to obtain a leader under whom they could destroy our Constitution.

The technique of a Nazi revolution is so effective that the defendant Deatherage was able to say that the technique of revolution had itself been revolutionized.

The conspirator Hitler showed the world how to effect this type of revolution. The government's evidence will show that the defendants were apt pupils of the Nazi method and took all the assistance that they could get from Nazi leaders.

The defendants were not revolutionists in the old sense that they carried bombs under long black capes. They were revolutionists in a much more dangerous sense; more dangerous because their technique was new, because it was always hidden under a smoke screen and because it flourished under the very democratic system which the defendants sought to destroy.

The technique of the defendants in the pre-revolutionary stage was to gain their ends by using words, words of hate instead of bombs, and mass propaganda instead of bullets, and they would have been safe in pursuing their Nazi revolutionary tactics had it not been, the Government contends, for the Act of June 28th, 1940, telling them not to cause disloyalty among the members of the armed forces and making such a thing a crime.

Comment:

The prosecution theory as to the correct meaning and application of the Act of June 28, 1940 involves a complete repudiation of the principles of the Bill of Rights, of free speech and of the doctrine as to free speech and such laws laid down by the Supreme Court in a series of recent decisions, all reversing judgments secured by a wartime witch hunting Department of Justice. These five decisions or reversals were the Schneiderman case, the Hartzel case, the Baumgartner case, the case of the twenty-four German-American Bundists and the case of Harry Bridges. Of the five reversals, three were in favor of persons charged with being pro-Nazi and two with being communists.

Nowhere in his opening statement, in the indictment, the bill of particulars or the conduct of his case did Rogge undertake to meet the criteria of the Supreme Court laid down in the above five cases or laid down by the Court of Appeals in sustaining convictions in the Dunne case for almost identically the same offense charged in the Sedition Trial. These criteria are proof of intent and proof of clear and present danger. To prove the defendants guilty of intent to cause insubordination among the armed forces and of having created a clear and present danger of such a result, the government needed an entirely different set of facts from those Rogge alleged and promised to prove with evidence in his opening statement. Nazi history and interpretation of Nazi history, even if entirely accurate, could not have sustained the charge or proved intent and clear and present danger against these defendants. As a matter of fact, Nazi history would not have sustained the charge even if all the defendants had been members of the Nazi party of Germany and pledged to its purposes. One crime the history of the Nazis will not prove against them is the crime of having tried to cause insubordination in the armed forces.

The crime charged had to be proved by the words and acts of the accused, and this proof could not consist entirely or even mainly of a showing that such words and acts were similar in certain respects to words and acts of the Nazis. Indeed, it is hard to see how the showing of any amount or degree of similarity between the words and acts of the defendants and those of the Nazis would, in any way, have tended to prove the charge of conspiring to cause insubordination in the armed forces. In other words, Rogge's case was a complete non sequitur. It was also in large part historically false and, in part, unprovable.

Mr. Rogge:

Now the Government will not contend that all of the defendants were always on good terms with one another, or that they always agreed on the precise way in which their object was to be accomplished. But the Government does contend that they all agreed on what the object was which they were to accomplish, and that that was to destroy our form of government, and set up a Nazi or Fascist form of government and that they were all agreed upon the way in which they were going to do it, namely, that they were going to cause our armed forces to be disloyal to our form of government.

The Government does not contend that the defendants had agreed to the last detail on the exact form of the new order, the exact form the new order would take, but it was definitely to be a part of the conspirator Hitler's New World Order, and that they did want a totalitarian state run according to the Fuehrer's principle and the Nazi concept of Aryanism.

Comment:

Agreement among the twenty-nine defendants as to the end—destroying our form of government and replacing it with a Nazi or Fascist form of government— and as to the means—causing disloyalty to our form of government—was clearly not susceptible of proof in the absence of any direct evidence such as a program subscribed to by all the defendants and setting forth these ends and means. It is permissible to infer from circumstantial evidence agreement and intent to commit certain relatively simple crimes like murder or robbery or even an elaborate scheme of embezzlement. But agreement on a political program such as Rogge alleges is not something to be proved by piling inference on inference and deduction on deduction. The rule in circumstantial evidence is that the inference of guilt may only be drawn if it is the only inference reasonably consistent with such evidence. If the inference of innocence is equally reasonable or tenable, it must be drawn. Observance of this rule would make it impossible to sustain a conviction on inference from Rogge's circumstantial evidence that the defendants had all agreed on the program he alleged. Rogge's own witnesses testified repeatedly to disagreement among the defendants as to such subjects as the leadership principle, the Nazi concept of Aryanism and so on. No government witness would confirm that any defendant had expressed or indicated agreement or intent to cause disloyalty among the armed forces. Rogge's contention was that such agreement or intent was something no witness should be examined about but something the jury should be left to infer from the mass of circumstantial evidence, consisting mainly of political utterances and accounts of political activities, all perfectly lawful, which he introduced.

It will again be noted that he always used the formula of "disloyal to our form of government" or some equivalent and never once in his entire opening promised evidence as to causing insubordination, mutiny, refusal of duty. His entire case hung on the validity of his interpretation of the law of June 28, 1940, which interpretation ran counter to the interpretation of the Court of Appeals in the Dunne case. The terms of the law are specific. The Supreme Court had laid down the rule in the Hartzel and Baumgartner cases that the law has to be narrowly or strictly construed in free speech cases. Rogge based his case on a construction of the terms of the law which, if generally applied, would end freedom of speech, since no one could criticize public officials, policies or institutions without thereby impairing loyalty to them. As defendant Dennis said in his opening to the jury, "How are we ever to get rid of President Roosevelt and the New Dealers if we cannot say anything about them that might impair the people's loyalty to the President and the New Deal?"

Mr. Rogge:

In 1935, for instance, there was a dispute among the members of the Bund as to the best way to bring about Nazism in this country. One group believed that the best way was to win over the German element to the cause first, and that the best way to do that would be that the Bund should continue to use the German language and customs. The other group believed that the best way was to win over native Americans to the Nazi cause immediately, and that in order to do this the Bund should give up its German language and customs. As a result of the dispute one group broke away from the Bund and formed the American National Socialist Party.

The other group remained the German-American Bund, of which the defendants Kunze, Klaprott, Schwinn, Diebel and Ferenz were members.

Comment:

The several defendants involved in the above paragraphs stoutly denied Rogge's explanation or interpretation of the split between the German groups named as well as Rogge's statement of the purposes of these groups. The authors of this book do not know the facts and have no interpretation to offer or sustain. They merely remark that one fact, even in Rogge's opening statement, sticks out like a sore thumb: the defendants were not united under one leadership or openly committed to any one program or plan. If, in spite of these divisions, there had been evidence that they were all saying and doing things intended or calculated to cause insubordination in the armed forces, there would have been a basis for the charge that they were in agreement as to doing that. But that was the one type of evidence Rogge did not have to offer. In lieu of it, he offered more and more history of the activities of the Nazis and the defendants, skillfully blending them so as to create the impression that these activities formed one pattern and followed one plan. This was done entirely by the processes of selection, arrangement, emphasis, suggestion and, in the last extreme, bald, unsupported assertion, as when he just called the defendants Nazis and let the adjective serve for proof.

Mr. Rogge:

With the other group, the American National Socialist Party went the defendant Peter Stahrenberg. As an organization, the American National Socialist Party did not reach the size of the Bund. However, the defendants Edmondson and Eugene N. Sanctuary spoke at meetings of the American National Socialist Party. The defendant Edmondson spoke both at meetings of the Bund and at meetings of the American National Socialist Party.

The defendant Stahrenberg, who lived in New York City, was one of the largest distributors of Nazi propaganda. He received propaganda from all over the world which was in furtherance of the Nazi movement—from Germany, from England, from Canada, and from South Africa, and distributed this propaganda throughout the United States and to most of the other defendants in this case, and most of the defendants in this case distributed their propaganda through the defendant Stahrenberg.

The defendant Stahrenberg, for a while, had his own publication which he called the *National American.* This paper boldly displayed the swastika as its emblem and claimed as one of its news services World Service in Germany. The defendant Stahrenberg also printed much of the propaganda material put out by the defendant Eugene N. Sanctuary.

Comment:

In connection with Rogge's general theory of guilt by association, according to which defendant *A* is supposed to be proved guilty of conspiring with defendant *B* to cause mutiny in the army by a mere showing that *A* spoke at *B's* meeting or that *A* bought or sold *B's* literature, it is relevant to recall the general standards laid down on June 28, 1945 by the Supreme Court (Supreme Court of the United States, No. 788 October Term, 1944. *Bridges* v. *Wixon,* 89 Lawyers Edition No. 17, page 1489) in reversing the judgment ordering the deportation of Harry Bridges as a member or affiliate of the Communist party, an organization allegedly devoted to preaching the overthrow of the government by force and violence. From this important decision we quote the following highly pertinent passage:

> He who renders financial assistance to any organization may generally be said to approve of its objective or aims. So Congress declared in the case of an alien who contributed to the treasury of an organization whose aim was to overthrow the government by force and violence. But he who cooperates with such an organization only in its *wholly lawful activities,* (These are the italics of the Supreme Court) cannot by that fact be said as a matter of law to be "affiliated" with it. Nor is it conclusive that that cooperation was more than intermittent and showed a rather consistent course of conduct. Common sense indicates that the term "affiliation" in this setting should be construed more narrowly. [The term "conspiracy" should certainly be construed as narrowly as the term "affiliation"]. Individuals, like nations, may cooperate in a common cause over a period of months or

> years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become "affiliated" with the Communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated the act or acts tending to prove "affiliation" must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere co-operation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition.

In the Bridges case the issue of fact was whether Bridges was a member of or affiliated with the Communist party, which, according to the contention of the government, was "an organization, association, society or group [note that the law does not use Rogge's term "movement] that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States . . . " The law does not name the Communist party. The Court in the Bridges case did not pass on the question whether the Communist party was such an organization. It passed only on the question whether Bridges was a member of or affiliated with the Communist party. It found the evidence insufficient on which Bridges had been held deportable as a member or affiliate of the Communist party.

Now it should be obvious to any one that it takes as high a quality of evidence to prove that any number of persons are members of a conspiracy as it takes to prove that they are members or affiliates of a political party. Evidence which the Supreme Court found insufficient to prove Bridges' membership in or affiliation with the Communist party would certainly have been held by the same court insufficient to prove his participation in a criminal conspiracy of that party or any other group. Yet the evidence submitted and accepted by the lower court to prove

Bridges was a member or affiliate of the Communist party was of a far more substantial and definite character than any evidence promised or presented in the Sedition Trial to prove that the defendants were Nazis. Of course, there was this big difference: in the Bridges' case the government had the burden of proving that Bridges belonged to a real organization, whereas in the Sedition Case Rogge undertook only to prove that his definition of a Nazi world movement included the defendants. Had convictions on Rogge's indictment ever gone to the Supreme Court, something no one in the case ever considered for a moment as remotely probable, the one big issue for that high tribunal to decide would have been that of whether people could be proved guilty of participating in a criminal conspiracy by the easy process of defining the term ''movement.''

In the Bridges case the Supreme Court recognized that the evidence had shown that Bridges' union cooperated with communist sponsored unions; that he had joined in the consistent attacks made by the communist sponsored unions on the so-called ''reactionary'' leaders of the American Federation of Labor; that he had supported communist candidates for political office; that he had advised his men to read communist literature; that he had used addresses of communists or communist affiliated organizations; and that he had addressed communist meetings. As much was not shown against any defendant in the Sedition Trial in respect of the Nazi Party or even in respect of the German-American Bund. Still, the Supreme Court held such evidence insufficient to prove either that Bridges was a communist member or affiliate or that he was committed to the communist program. We ask our readers to consider these dicta of the highest tribunal in the land in connection with Rogge's offer of evidence against the defendants.

Rogge at no time during the Trial promised or presented evidence showing or purporting to show that any defendant or any defendant organization or group ever advised, counseled, urged or caused mutiny or insubordination among the armed forces. Instead, he merely offered piles of evidence of perfectly lawful acts and utterances on the part of different defendants and of acts and utterances on the part of members of the Nazi Party and officials of the German Government, which, whatever their other qualities, had nothing to do with the substantive offense penalized in the law.

In the sixth month of the Trial, on October 6, 1944, Rogge presented his first and only witness to show direct contact by mail with the armed forces. The witness was Hubert Schmuederich, forty-two years of age and an inmate of the federal penitentiary at Milan, Michigan—he had refused to register for the draft—who testified, not under oath but by affirmation, that he had got a batch of pamphlets entitled *National Socialism and Its Justification* (government exhibit 3364), from the defendant Peter Stahrenberg in his store in New York City and mailed out a few hundred copies to men in the armed forces. This looked bad for a moment to defense counsel as it seemed to involve a defendant and to be relevant to the offense charged in the indictment.

However, on cross-examination by defense counsel St.-George, this witness testified that the stamp on exhibit 3364, "The Grey Shirts," was that of an organization which he himself had organized and that he was its president. That looked bad until he added that he was its only member. He testified further that the pamphlet had been written in 1935 by some one he did not know; that he shared the sentiments therein expressed; that he took these pamphlets in payment of a debt Stahrenberg owed him; that in May or June 1941 he mailed two hundred copies to men in the United States armed forces because he wanted to keep America out of the war; that it was his "own idea to mail these two hundred copies"; that he had secured the names and addresses from *The New York Journal,* which had published them; and that none of the defendants, including Stahrenberg, had anything to do with it or knew anything about it. And this testimony becomes the more absurd when it is considered that there was nothing in the pamphlet advocating insubordination?

During the course of the seven months of the Trial the authors of this book made a point of asking every government witness they cross-examined—and they cross-examined nearly every witness—whether the witness could testify to having seen, heard, read or known of any act or utterance related to advising or causing insubordination in the armed forces. The defense lawyers in the case called this the $64 question. Most of them were opposed to asking this question of every witness lest something be brought out damaging to the defendants. But the $64 question never once elicited an answer to support the charge of the indictment, and towards the last few weeks Rogge began objecting to the question. It was too pertinent to the charge to be comfortable for the prosecution!

A particularly good witness for the prosecution was a former editor of the German-American Bund newspaper who had been to a Nazi propaganda school in Hamburg for the indoctrination of pro-Nazi Germans living abroad and was probably under some duress, being out on parole on a morals charge sentence for which he had been expelled from the Bund and for which he could be deported at the government's pleasure. This potentially dangerous witness for the defense testified on cross examination by Dennis as follows (page 11,839 of the Record, witness Severin Winterscheidt):

> Q. In your testimony of your last two appearances you have told us of your extensive experience with the Nazi organizations, and qualified yourself as a man very familiar with them?
>
> A. Yes.
>
> Q. Now, I want to read to you two sentences from the indictment in this case, and ask you to pay attention to them:
>
> > In 1933 the National Socialistic German Workers Party, also known as the N.S.D.A.P. and the "Nazi Party," came into power in Germany upon a program publicly announced by its leaders to destroy democracy throughout the world and to establish and aid in the establishment of National Socialist or Fascist forms of government in place of the forms of government then existing in the United States of America and other countries.
>
> Now, with reference to that sentence containing the declaratory statement, I ask you specifically whether you ever saw a program publicly announced by the leaders of the Nazi Party stating that it was formed to destroy democracy throughout the world and to aid—and to establish and aid in the establishment of National Socialist or Fascist forms of government in place of the form of government then existing in the United States of America and other countries? Did you ever see this.

A. No, I never heard of any plan to destroy the government of the United States, no.

Q. Now, I ask you, did you in your attendance at this school at Hamburg have explained to you a systematic campaign of propaganda designed and intended to impair or undermine the loyalty and morale of the military and naval forces of the United States of America?

A. No, there was nothing at all about the military or naval activities of other forces, military forces of other countries.

Q. Did you carry on or carry out the campaign that is described there in America? You, yourself?

A. No, I did not teach anything about that. There was nothing mentioned about that.

Q. Well, do you have knowledge of people carrying out that campaign?

A. No, I cannot state about that.

Here we have the government's own witness, whom it did not impeach, giving the lie to the historical assertion in the indictment and to one of the major contentions of Rogge's opening. He had been to a Nazi indoctrination school in Germany under the Nazi regime to train pro-Nazi Germans living abroad. He had heard and knew nothing about what the government alleged was a publicly announced Nazi Party program to overthrow existing forms of government and replace them with Nazi forms of government by means of causing insubordination in the armed forces. He had heard nothing about propagandizing or impairing the loyalty of the armed forces abroad. Not a single government witness, on cross examination by the authors of this book, would confirm the assertion in the indictment about the "publicly announced" "program" "to destroy democracy throughout the world." The statement as it appears in the indictment must go down in history as one of the most barefaced lies that was ever put in a criminal indictment. It could not be proved by the defense that there was no such secret program. A negative of that sort is unprovable. But it could be proved that no such program was ever "publicly announced."

CHAPTER XIII.

PROSECUTOR'S OPENING STATEMENT (Concluded).

Mr. Rogge:

I should say a word more about *World Service*. The Government will prove that World Service was one of the most important Nazi propaganda sources for countries outside of Germany. The Nazis conducted propaganda schools in Germany to which representatives came from all over the world. At these propaganda schools the Nazis taught these delegates from all over the world how to further the Nazi movement in their own respective countries. The Nazis told them what Nazi literature to use. The Nazis recommended to them, along with the conspirator Hitler's *Mein Kampf* and the conspirator Rosenberg's *The Myth of the Twentieth Century,* the publication *World Service. World Service* dealt principally with the anti-Semitic and anti-communist phase of Nazi propaganda. We will show that Hitler used anti-Semitic propaganda as one of his weapons for disintegrating the social order and the loyalty of the armed forces of Germany and attempting to disintegrate the social order and loyalty of the armed forces of the other nations of the world, including the United States.

Comment:

As already shown, the most bitterly anti-Nazi writers and authorities are unanimous in contradiction of any assertion about the Nazis having disintegrated the loyalty of the armed forces of Germany or the social order in Germany. Hitler was successful precisely because his movement integrated and fortified the elements and forces in Germany which were most German and most traditional and, particularly, because his movement stood for a loyal, disciplined German army. The war guilt case being widely stated and officially pressed by the United Nations while this book is being written rests squarely on a thesis about Hitler's movement and its effect on the acceptance by the German people which is wholly contradictory of Rogge's thesis. Rogge's thesis, if tenable or even arguable, would make the best defense possible for the Germans in any war guilt trials. No doubt many Germans will argue just what Rogge argued in the Sedition Trial. But any such claims will be laughed out of court.

Mr. Rogge:

For that reason, *World Service,* published at Erfurt, Germany, and later at Frankfurt-am-Main, was extensively circulated in the United States. The defendant, Stahrenberg, received large quantities of *World Service* material. Many of the other defendants also received *World Service* material, including the defendants Winrod, Edmondson, Deatherage, True, Elizabeth Dilling, Charles B. Hudson, Eugene Sanctuary, Frank W. Clark, Lois de Lafayette Washburn, and others. The Bund, of course, received *World Service,* distributed and reprinted articles from it.

Not only did the defendants in this case receive *World Service,* but they sent their publications to *World Service* to be distributed in and from Germany. I have already told you that the defendant Edmondson, sent his publication to *World Service* through the German Consulate on German ships to be transported free of charge.

We will show you that the defendant, Ernest F. Elmhurst, visited Germany and attended a Congress at Erfurt under the supervision of *World Service.* Representatives from all over the world were present. The Government is going to contend that when Elmhurst participated in that conference at Erfurt, Germany, with representatives from other countries, he did so because he was part of the worldwide Nazi movement.

Comment:

It should be noted that Rogge, himself, states that *World Service* propaganda was essentially anti-Semitic and anticommunist. The facts that certain, though by no means most, of the defendants received and distributed such propaganda and sent to *World Service* their own propaganda, would be entirely relevant if the charge were a conspiracy to disseminate anti-Semitism and anti-communism. No evidence was promised or presented to show that the propaganda of World Service had anything whatever to do with the armed forces or causing them to be insubordinate.

The last sentence in the above passage from Rogge reveals again that the government's entire case rested on a certain type of improper inference rather than on evidence. The reasoning is that if the defendant Elmhurst was not a Nazi, why did he go to a Nazi conference and that if he was a Nazi he was guilty of conspiring to violate the Act of June 28, 1940, by virtue of Rogge's definition of Nazism, the Nazi world movement and of the law, not by virtue of Elmhurst's acts. In this connection we quote the following from the Supreme Court decision in the Bridges case:

> The associations which Harry Bridges had with various Communist groups seem to indicate no more than cooperative measures to attain objectives which were wholly legitimate. The link by which it is sought to tie him to subversive activities is an exceedingly tenuous one, if it may be said to exist at all.

Rogge's repeated contention—and his case was all contention and assertion as to what should be inferred from his evidence—was that the German-American Bund, the Nazi Party, the German Government, and any group avowedly pro-Nazi were, ipso facto—by virtue of Rogge's definitions—a criminal association committed to undermining the loyalty of the armed forces. On this point the authors cite the decision of the Supreme Court handed down June 11, 1945 reversing the conviction of twenty-four members of the German-American Bund, three of whom had been put in the Sedition Trial to give it the ''sauerkraut flavor'' as Counsel Dilling termed it. These Bundists had been convicted of conspiracy to evade, resist and refuse service in the armed forces of the United States in violation of Paragraph 11 of the Selective Service Act of 1940, 50 U.S.C. App. 311. In that case the government, as the Supreme Court observed, put in every bit of prejudicial evidence it could find against the Bund. On this point the Supreme Court said:

> Indeed a question arises whether it was not an abuse of discretion to permit the Government to go, at such inordinate length, into evidence concerning the Bund and its predecessor, the Friends of New Germany, during a period of seven years prior to the inception of the alleged conspiracy; and concerning Bund uniforms and paraphernalia, and pictures and literature in the possession of various defendants.

At all events, the government put in against the twenty-four Bundists about everything that could be found to create prejudice against them. The indictments were brought in July and August of 1942. Much of the same material Rogge trotted out against the defendants and on July 13, 1944 he stated in open court during the course of the Trial that the government relied largely on what it had proved against the Bund to convict the defendants. What had convicted the Bundists should convict the defendants, especially as three of the convicted Bundists were put in the Sedition case to be convicted again of the same basic offense, that of having been pro-Nazi. And the guilt of the three convicted Bundists should attach by inference to the other defendants.

At this point we offer the readers in parallel columns Rogge versus the Supreme Court on the criminality of the German-American Bund:

Rogge (6588 of the Record in the Sedition Trial):	The Supreme Court reversing the conviction of the twenty-four Bundists:
I think the evidence that we have already introduced has shown that the Bund was the spearhead of the Nazi movement in this country; that the evidence that is already in shows many of the defendants collaborated with the Bund. There will be further evidence to show that it was an integral part of the Nazi revolution to appeal to members of the armed forces to be disloyal to the existing democratic republican form of government.	The professed purpose of the Bund was to keep alive the German spirit among persons of German blood in the United States. Speeches and literature justify the inference that the Bund endorsed the Nazi movement in Germany and, if it did not actually advocate some such form of government in this country, at least essayed to create public opinion favorable to the Hitler regime and to the German National Socialist State. The Bund was also anti-British and opposed our entering the war on the side of the British; its aim was to keep us neutral and friendly to the new Germany. There is much in literature put out or approved by the Bund concerning "discrimination" against

American citizens of German blood and the fight which must be waged against it. There is also much to the effect that the Bund is pursuing lawful aims within the constitutional rights of its members, and that its activities need not be hidden from governmental agencies. There is basis for suspicion of subversive conduct; there is matter offensive to one's sense of loyalty to our Government's policies. There may well be doubt of the organization's hearty support of these policies,

but if the Bund and its membership were, prior or subsequent to January 1, 1940, engaged in illegal activities, other than those claimed to prove the charge laid in the indictment, the record is bare of evidence of any such.

We are of the view, therefore, that, on the case made by the Government, the defendants were entitled to the direction of acquittal, for which they moved.

The authors of this book again remind the reader that they are not trying to acquit any defendant in the Sedition Trial or to make out a case for the defendants. The authors merely associate themselves with the Supreme Court's view of the Bund. As far as we are concerned, the defendants were never properly on trial. The government's case was on trial in the court room and is here on trial. This book seeks to explain why the Trial was a farce.

Mr. Rogge:

We will show you that another Nazi who attended the same *World Service* conference which Elmhurst attended was the South African Nazi, Henry Beamish. Beamish was the one whom you will recall I told you the evidence will show visited this country and spoke before the German-American Bund at the Hippodrome meeting with the defendant Edmondson of this country and the defendant Arcand of Canada. At the same *World Service* conference which the defendants Elmhurst and Beamish attended, the delegates signed a testimonial to the defendant Edmondson for his part in the Nazi movement. At the end of this case, the Government is going to ask you whether the defendant Edmondson was circulating the bulletin of his alleging that President Roosevelt was a Jew and did not have the best interests of his country at heart, whether he was acting as an American expressing an honest opinion, or as a conspirator with the Nazis carrying out Nazi propaganda to promote the Nazi purpose of destroying our Government which earned for him the testimonial from this Nazi World Service conference.

World Service frequently quoted from the publications of the defendants and had nothing but praise for them. The defendant Deatherage was unable to attend a *World Service* conference to which he was invited, so he sent a prepared speech which was read for him.

Comment:

It was contended by the defendants who had received *World Service* propaganda that World Service was an organization devoted to a crusade against communism which had antedated the advent of the Nazis to power and had been inaugurated under non-Nazi auspices. After the Nazis came in, World Service, naturally, became *gleichgeschaltet* or coordinated with the Nazi regime, along with all other propaganda agencies. Whatever the truth about World Service, one thing is absolutely certain; it had had no connection with propaganda to cause insubordination, except on Rogge's theory which defines anti-Semitism and anti-communism as offenses within the meaning of the Smith Act.

Mr. Rogge:

The Nazi movement, the evidence will show, covered the entire United States. I have already told you briefly how it operated in New York, Washington, D. C., in Chicago, Kansas, in Detroit, and in Los Angeles. It also operated in the northwestern part of the United States. The defendants Frank W. Clark and Lois de Lafayette Washburn, first with an organization which they called the "National Liberty Party," and later under the name of the "Yankee Freeman" heiled Hitler and sought to carry forward the objectives of the Nazi revolution.

The defendant Washburn had come from Chicago, where she had actively cooperated with the German-American Bund. The defendant Clark was a former lieutenant of Pelley's, and from his northwest headquarters cooperated with the defendant Baxter at Los Angeles, the defendant Deatherage of West Virginia, the defendant Smythe of New York, and other defendants.

The defendant Clark several times made the statement that he was the American Hitler.

Comment:

If the evidence had shown that this defendant made the statement attributed by Rogge to him, this fact would in no way be relevant to the charge, though it might tend to support a writ de lunatico inquirendo such as defendant Dennis filed against certain defendants at the beginning of the Trial.

Mr. Rogge:

He pointed with pride to the fact that twenty-one of the twenty-five points of the conspirator Hitler's program were embodied in the platform of his group, the National Liberty Party.

Comment:

It is perhaps relevant to observe that Hitler's twenty-five point official program of the Nazi Party, to be found in translation on pages 222-225 of the United States State Department's official handbook entitled NATIONAL SOCIALISM, contains nothing to support any of Rogge's assertions or the assertion of the indictment that the Nazis had come to power on a publicly announced program calling for the destruction of democracy all over the world. As a matter of fact, the only publicly announced official program of the Nazi Party is a fairly innocuous piece of writing. Most of the twenty-five points are found in the program of the British Labor Party. It says absolutely nothing against democracy or the republican form of government and nothing about abolishing either. Whatever crimes the Nazis committed in their term of office were not foreshadowed in their publicly announced program, except, to some extent, as regards the Jews. And a great many points in their publicly announced program were never carried out by the Nazis, or for that matter, even seriously undertaken by them.

Mr. Rogge:

The Government's evidence will show you that this defendant sought to have his pronouncements circulated within the Bund and that he suggested that a particular letter be sent to the German Consul in Chicago and to Germany also. He also said that he had received a book from Germany which was sent to him at the conspirator Hitler's direction.

Comment:

The activities and statements just attributed to this particular defendant cannot tend to prove anything relevant to the charge of conspiring to cause insubordination in the armed forces. They are essentially trivial. If the evidence would show that this defendant's pronouncements had been circulated within the Bund and that they had in some way called for or counseled insubordination in the armed forces, then, and only then, would the evidence be relevant to the charge.

Mr. Rogge:

I have stated that there were many different types of people in this movement. The evidence will show that there were orators, like the defendant McWilliams, organizers like the defendant Deatherage, and writers like the defendants Lawrence Dennis and George Sylvester Viereck. In Germany, the conspirator Hitler was the orator, recognized leader and spokesmen for the Nazis. But everyone knows that a movement has to have men who can think, formulate plans and ideas, and feed them to the men out in front whose business it is to win over the public. The defendant Dennis was that type of man in the American Nazi movement. He was the mentor and advisor of the defendants McWilliams and Deatherage. He was in direct contact not only with Nazis in this country but also in Germany. The evidence will show that he was called the No. 1 American Nazi and that he was proud of the label. He openly stated that he was for a form of Nazism in America. The defendants with whom he worked stated that he would be with them when the time came.

Comment:

Rogge's statements as to what the evidence would show in regard to Dennis are peculiarly illustrative of the nature of the government's case. Inasmuch as during the entire seven and a half months of the Trial Dennis' name was mentioned only seven times in as many extracts from the Bund paper quoting a sentence or two from something Dennis had written in *The American Mercury,* his Weekly Foreign Letter or his book, *The Dynamics of War and Revolution,* the authors cannot discuss the government case against the man Rogge called the Rosenberg of American Nazism, except to suggest the following observation: the statements of Rogge in his opening as to what the evidence of the government would show about Dennis and the record reveal that the government either had no case against Dennis or that it was, for some reason or other, not disclosing that case either in the prosecutor's opening statement or the first seven and a half months of the Trial. It is for the readers to draw their own conclusions.

Even had Dennis been the mentor and adviser of two of the defendants and even had he been in direct contact with the Nazis in this country and abroad, which anybody was who exchanged a letter or a social visit with any German government or university official, such facts would have proved absolutely nothing relevant to the charge. Dennis was a professional writer and lecturer who had his own private office on East 42nd Street, New York City, two blocks from the Grand Central Station. He was, therefore, accessible to all sorts of people who wanted to come to see him or whom he met in his social or lecturing contacts. Many of these people were communists, leftists and liberals of all shades. When a distinguished English writer on the extreme left, John Strachey, came to this country back in 1938 and was for a time detained at Ellis Island as a communist or possibly inadmissible foreigner, he dropped Dennis a line with a copy of his newest book. Having known Strachey for many years, Dennis had him out to his home for dinner and they sat up into the wee sma' hours talking politics and discussing the state of the world, about which they had as many disagreements as agreements. Before Strachey left, Dennis had him again to his club in New York for lunch.

The editors of *The Nation, The New Republic, Foreign Affairs* and *The American Mercury* have all had Dennis out to lunch or dinner to talk with him. All of these publications have published more than one article by him. Rogge chose only to show that the Bund Newspaper had quoted seven times from Dennis' published writings. It could be said in Rogge's twisted and dishonest way of using words that Dennis had been the mentor and advisor of all these editors who discussed current affairs with him, usually with a view to getting an article from him. (No such contacts could be shown by Rogge between Dennis and any Bund editor or publisher.) But, obviously, any such statement would be as silly as Rogge's saying that Dennis was the mentor and advisor of defendant McWilliams.

Dennis, as a matter of fact, welcomed and sought contacts and exchanges of views with all sorts of people, with many of whom he had nothing in common except an interest in the subjects discussed. All that is a necessary part of the professional activities of a writer, lecturer and analyst of current affairs. It goes without saying that many who talked with Dennis quoted him, and that many with whom he may have disagreed on most things quoted him approvingly on certain subjects. The idea that a man is to be judged by the company he keeps is not a safe rule to apply to writers who have to make a business of familiarizing themselves with all sorts of people, points of view and causes.

Having for years been a career officer in the United States Diplomatic Service and for years in Wall Street as a representative of large financial firms at home and abroad, Dennis had long moved in the highest international circles of politics, finance and diplomacy. He, therefore, had extensive acquaintances among German diplomats, government officials and scholars, journalists and men of affairs. Rogge's entire argument assumes that contacts and associations with any German who was not an anti-Nazi are to be considered in the same class as associations with gangsters, white slavers or hardened criminals. The fact any person has had such bad associations is generally presumed to indicate that he is a bad egg and one likely to have been involved in some criminal enterprise with these evil associates. The absurdity of any such reasoning or association of ideas should be obvious to any fair minded person.

Back in 1938 Dennis was approached in his university club in New York City by a man then unknown to him who happened to enjoy the privileges of that club, having attended that university. He introduced himself to Dennis as a secretary of the German Embassy. He had read with approval something Dennis had written. He invited Dennis to stop in for a cocktail some evening when he was in Washington. And so on. When Dennis was in Berlin in 1936 on a trip paid for by a Wall Street firm, he was shown modest courtesies by some of his former colleagues in the German Foreign Office and by the President of the Harvard Club of Berlin, who happened to be head of the Amerika Institut of the University of Berlin. The latter Institut is named in the indictment and the former President of the Harvard Club of Berlin, Dr. Bertling of the Amerika Institut, is named as a co-conspirator of the defendants, presumably because it was among Bertling's functions in his university post to be nice to American university men and scholars who happened to come his way and because, in so doing, he was pro-Nazi. Bertling was not a Nazi party member but, obviously, in that period no university or other official in Germany could have held his job without being pro-Nazi. When a criminal conspiracy charge is supported by evidence of such association, is it any wonder the resulting trial is a farce?

Rogge said that Dennis "was called the No. 1 American Nazi and he was proud of the label." Rogge should have said by whom Dennis was called that. If he had been called that by his enemies or political critics, such name-calling would have no probative value or even serious significance. If there had been evidence that Dennis was the head of any organization or group or that he was a mere member of one in which he was recognized as a Nazi, this should have been stated by Rogge. If Rogge had evidence that Dennis had ever become a German or Nazi agent, he should have said so in this connection. If Dennis had ever stated that he was for a form of Nazism in America or that he was a Nazi, such a statement might have been mentioned.

Finally, with regard to Dennis, called by Rogge the Rosenberg of American Nazism and the idea man of the Nazi movement in America, it is obvious that if Dennis had played any such role, he would have been as well known to and as much read by most of Rogge's witnesses as was Rosenberg by all good Nazis in Germany. Yet, on cross-examination by Dennis, the government's Bund witnesses testified that they had never heard the name of Dennis mentioned in Bund circles. Indeed, during the entire trial, either on direct or cross-examination, not a single witness linked Dennis with any other defendant or with any member or official of the Nazi Party or the Nazi Government of Germany.

It seemed as if the prosecution theory had been conceived like the plot of a penny thriller which called for certain characters, one of which had to be an intellectual and a writer like Rosenberg. Dennis was picked as the best available man for this role. Proving that he fitted the role was simply a matter of defining the movement so as to include Dennis, and showing that Dennis had been quoted seven times by the Bund newspaper. Had the Trial gone on a few years longer, Rogge might have got around to showing all the open and innocent social and professional contacts Dennis had had with German diplomats, scholars and men of affairs. He might have shown that Dennis had been well spoken of in German circles because Dennis, like many another American of much greater renown, had opposed America's entry into the war. That, of course, in Rogge's way of presenting the case to the jury, was the same thing as working for the Nazi cause which, during the period in question, was most indubitably also to keep America out of the war.

Mr. Rogge:

The defendant George Sylvester Viereck's function in the conspiracy was a little different from that of the other defendants. The Nazis had to reach different levels of the population in this country, and they had to use different approaches to reach those levels.

Comment:

The reader is here asked to note carefully how Rogge confuses the issue. The crime charged was not conspiracy to influence American public opinion favorably to Germany or against American entry into the war. Had that been the charge, rather than a charge of conspiracy to cause insubordination in the armed forces, all or most of the defendants would certainly have been guilty, since all were undoubtedly opposed to American entry into the war. Rogge talks about Viereck's propaganda activities or functions as a registered agent of the German government in this country. Viereck was during the Trial serving a sentence on a conviction in connection with his propaganda activities. He was not convicted on a charge of having engaged in such activities—there was no law against that. He was not convicted on a charge of having failed to register as a German propaganda agent—he had so registered. He was convicted on a highly technical charge of having failed, in his registration statement, to make, what the government contended and the court held was, a requisite disclosure of all his activities as a registered agent. Rogge was now trying Viereck again for those activities which the court had recognized in Viereck's previous trials were perfectly lawful.

Mr. Rogge:

The defendant Viereck had direct contact with the Nazi propaganda chiefs in Germany. He saw the conspirators Hitler, Goebbels and Rosenberg personally. He dealt with the Nazi press chief, Otto Dietrich, and with the former Ambassador, Hans Dieckhoff. These Nazi conspirators, the evidence will show, paid him well to further the Nazi cause in this country. Soon after the conspirator Hitler became Chancellor, the Nazi hired the defendant Viereck to make the Nazi excesses more palatable to the American public.

Comment:

The Rogge line here is highly inflammatory and wholly beside the point of intent on the part of Viereck to cause insubordination in the armed forces. There could be no question about Viereck having served the German or Nazi cause in this country, or about his having been paid to do so. But these facts in no way proved that he was in a conspiracy to cause or attempt to cause insubordination in the armed forces. Maybe Viereck did just that. Maybe he attempted to cause sabotage. Maybe he did all sorts of things against the peace and safety of the United States. The authors of this book have no means of knowing. But a recital of his lawful activities as a German paid propagandist, for the doing of which he registered with the Department of State, in no way proves that he did any of these unlawful things. According to Rogge, all the German diplomatic and consular agencies throughout the world were carrying on a world conspiracy to cause insubordination in the armed forces. If they were, this would have to be proved by evidence other than of their lawful activities. The F.B.I. had stated up to the time this book was written that of all the acts of sabotage which they had discovered in this country, they had not been able to link any one with an enemy agent. Quite possibly the Germans had agents in this country for the commission of sabotage, but it is absurd to impute, without proof, the commission of sabotage to German diplomatic, consular or propaganda agents in this country before Pearl Harbor.

Mr. Rogge:

For years, the evidence will show, the Nazis endeavored to put across their program throughout the world merely by propaganda. When they could no longer succeed through propaganda alone, they attempted to put across their doctrine by force, by war.

Comment:

Note well that Rogge asserts that the Nazis went to war to put across their doctrine by force. The authors know of no historian or writer on the subject who says that the Nazis went to war to put across their doctrine. The general consensus is that the Nazis went to war for material ends, like more territory and political hegemony over Europe, which they undertook to create and maintain through force of arms and economic pressure. The idea that the war for the Nazis was a religious war to impose the Nazi doctrine is one which finds no support in any writings on the subject the authors of this book have ever seen. What Rogge was trying to do, of course, was to create in the minds of the jury the impression that the Nazis were fighting a war for a doctrine in which war the defendants were all war partners of the Nazis because the defendants held the same doctrines. We could say, with the support of most authorities, that this statement about the Nazis was wholly false. We confine ourselves to saying that it was not susceptible of proof.

By way of sustaining the contention that this proposition is unprovable, the authors point out that the consensus of authoritative interpretation is that the war was not a war of ideologies at all but a war of rival imperialisms and rival nationalisms. Nazi doctrines had more in common with Russian communism than with the political doctrines of Admiral Horthy of Hungary or General Antonescu of Rumania. German imperialism had more in common with British imperialism than with the national policies of Hungary or Rumania, both Nazi German allies. The historical fact, of course, is that similar political doctrines and similar types of nationalism and imperialism do not tend to combine or work together but rather to fight each other. So, even if Rogge could have proved that the political ideas of the defendants were identically those of the Nazis, that would not have established even a presumption that the Nazis and the defendants were in a conspiracy to achieve the same ends jointly; quite the contrary.

The consensus of informed opinion on this point just noted was well stated by Demaree Bess in an article "Can We Live With Russia?" which appeared in *The Saturday Evening Post* of July 7, 1945, in which he said, among other things: "But the war in Europe, it now becomes clear, was not a war against an ideology. It was a war against Germany and her satellites." Bess further states what almost every one is agreed about when he says: "As many competent observers have pointed out, the Nazis were nihilists, who never possessed any logical creed."

This last statement states a point which defendant Lawrence Dennis repeatedly made through cross-examination and in argument during the entire course of the Trial. In so doing, Dennis seemed to confuse the case by de-simplifying Rogge's general theory of the war. Bess makes the further point which becomes more obvious every day that if this war had been a war of ideologies or a war against totalitarianism, we should now be in the position of having lost the war, since totalitarianism emerges from the war stronger than ever due to the facts that Russia is more totalitarian than Germany or Italy ever was and that Russia is the big winner of the war. One might also add the suggestion that America seems closer to totalitarianism now than it was before the war. Had this been a war of totalitarian ideology or doctrine against the opposite, Russia and Germany would have remained allies and the result might have been entirely different, as Bess also points out. He says: "We can be grateful that this was not a war between totalitarian states and western democracies, because if it had been such a war, then the outcome might have been quite different."

The farcicality of the Sedition Trial was in large part due to the fact the Rogge had to argue and try to sustain with evidence a thesis which ran counter to the consensus of informed interpretation of recent and current history. He doubtless assumed that, inasmuch as this thesis was violently anti-Nazi and as the defendants were lacking in resources to pay for appropriate experts for a proper defense, the weakness of his case would be neither revealed nor exploited. Rogge knew he could not link the defendants, either with each other or with the commission of any acts showing intent to cause insubordination among the armed forces, so he had to try to get away with the contention that they were all linked in doctrine, with the Nazis, with each other and with intent to cause insubordination. Briefly, as he could not link them in deeds he tried to link them in doctrines. But linking them in doctrines would not have sufficed unless he could have proved they all cherished the doctrine of causing insubordination. He knew he could not plausibly impute that doctrine to the defendants, but thought he could get away with laying it to the Nazis. Only it so happened that causing insubordination in the armed forces was one of the few crimes that could not be reasonably charged or possibly proved against the Nazis.

To link the defendants, Rogge had to try to do it in terms of common ideas. And that was as absurd as trying to link the Germans and the Russians because their respective ideologies had so much in common. The common sense of it all is that neither nations nor individuals nor politically minded groups can be or ever are, as a practical matter, united solely or mainly by ideology or by reason of having a common set of ideas and doctrines. Nations and minority groups have to be united by common interests, not by common ideas of an abstract or general nature. Rogge never once promised to submit evidence to prove a common bond of interest among the defendants, as for example, that they were all paid by the same source or took orders from the same principal. On the contrary, he promised evidence showing that most of them were rivals, several wishing to be leader of a national movement, and most of them heading a little group or publication of his own.

Returning to the defendant Viereck, whose inclusion in the case Rogge thought would strengthen the prosecution though, actually, he could only weaken it, it may be said that Rogge promised and presented no evidence to link Viereck with any defendant other than one who had been associated with him. Viereck had a professional and pecuniary tie with Nazi Germany by reason of having been employed by the German Library of Information and a German newspaper. The German-American Bundist defendants had a tie of blood and sentiment with Nazi Germany. But the twenty odd native born American defendants had neither a tie of blood nor of pecuniary interest with Nazi Germany. Therefore, Rogge, to sustain his charge of conspiracy, had to link all the defendants in a bond of common doctrine, which, quite simply, was nonsensical, just as it would be to try to link Germany and Russia or even Britain and America in the same bond. Nations and people are linked by interests, not political doctrines.

Viereck was a highly competent writer and propagandist who doubtless earned professionally every penny he received from the Germans. But, in no sense, was he a Nazi by conviction. He was a professional writer and publicist. He was pro-German, being German born, but so were many persons who were not pro-Nazi. His propaganda task, as evidenced by the propaganda he wrote and the propaganda against American entry into war by certain Congressmen which he distributed in large quantities, was not to cause insubordination in the armed forces. Far from it. He could not conceivably have combined propaganda to cause insubordination in the armed forces with propaganda intended to appeal to the sort of people to whom the literature of the German Library of Information was sent. The worst that can be said against Viereck's propaganda was that it aimed to sell Nazi Germany and American neutrality. Obviously, propaganda advising or tending to cause insubordination could not possibly have served either of these two purposes. Viereck's own voluminous published writings furnish conclusive internal evidence that he was neither a Nazi nor an anti-Semite. Rogge was not able even to link Viereck with the German-American Bund. Rogge could only connect him with his German principals for whom he worked professionally and for pay, and with certain American Congressmen whose pro-neutrality and anti-interventionist speeches he circulated in large quantities with a view to opposing American aid to the Allies and American entry into the war. Whatever these particular links and activities may have proved, they certainly did not support the charge of conspiracy to cause insubordination in the armed forces. In this connection it is also to be borne in mind that many public relations counsel such as Ivy Lee and Carl Byoir had worked professionally for pay for the Germans during the Nazi regime.

Mr. Rogge:

When the Nazis resorted to war, the defendant Viereck increased his propaganda output. He directed much of his propaganda against the democratic allies. For this purpose he used a small publishing house in New Jersey named Flanders Hall, which he completely controlled. He also used the defendant Prescott Dennett here in Washington. The defendant Viereck preached constantly the justice of the Nazi cause.

The defendant Viereck and Dennett climaxed their activities right here in Washington, within a stone's throw of this very building, by printing and distributing a post-card which set out in fearsome language the perils which would confront our American soldiers in case they should go to North Africa. To his Nazi masters, the defendant Viereck, the evidence shows, described that postcard as "amusing."

As the Nazi war on the democratic world grew more intense, the evidence will show that the defendants increased their propaganda campaigns. They attacked, the evidence will show, every step which our Government took to defend itself. When our country began to enlarge its army through the Selective Service Act, the defendants first fought against the enactment of the statute and then, through propaganda, preached to the soldiers that they were being trained, not because our country needed to be defended, but because our public officials and the Congress were betraying the American people. This was the propaganda line that they used to impair the loyalty of our armed forces and to further the cause of Nazism.

Comment:

From the foregoing it is clear that, in Rogge's view, any one who opposed his country's entry into a given foreign war could be proved guilty of impairing the loyalty of our armed forces and furthering the cause of whatever foreign nation it might happen that the foreign policy of Washington was leading America ultimately to fight. Such a theory is obviously silly and altogether incompatible with freedom of speech and freedom of the press.

Mr. Rogge:

While it is true that many Americans in good faith opposed our steps to prepare ourselves for the coming attack and to help fight the Nazis, the defendants cannot be identified with such persons, as they will undoubtedly try to have you believe, since the intent of the defendants was not a patriotic one, not an American one, but an intent, the Government submits the evidence in this case will show—an intent on their part to promote the Nazi cause throughout the world.

Comment:

Here it is to be especially noted that Rogge makes the validity of his entire case depend on his proving the intent of all the defendants to promote the Nazi cause throughout the world. Without undertaking to summarize and weigh all the evidence, such as it was, any one who followed the Trial could say that it would be impossible to prove such intent in the total absence of two types of evidence which Rogge neither promised nor presented, namely, evidence that all the defendants belonged to one organization or group committed to the criminal purpose he charged, or evidence that the defendants were acting for pay pursuant to instructions to try to bring about insubordination among the armed forces. Rogge's contention was that the defendants pursued this crminal purpose of trying to cause insubordination in the armed forces as a matter of faith and doctrine which they all shared, being members of his so-called Nazi world movement. Even in the case of the defendant Viereck who received thousands of dollars as a professional public-relations expert working for the Nazi cause in this country, as Rogge put it, the evidence only tended to show that he tried to serve that cause by presenting Nazi Germany in a favorable light to Americans and furthering propaganda in favor of American neutrality. The evidence proved and suggested only that his intent was to earn a good living by making propaganda to keep America out of war with Germany.

In Viereck's case as in the cases of other defendants who propagandized in the hope of keeping America neutral in the war, the facts are entirely consistent with the hypothesis that he carried on such activities with a patriotic and purely American motive and with a motive of self-interest in earning a professional income. The point is that Rogge's charge of intent to promote the Nazi cause throughout the world as he had defined that cause could hardly be proved except by direct evidence or confession in open court. Rogge proposed to prove this Nazi intent by circumstantial evidence. On this point of law we cite the following decisions as to what may properly be proved by circumstantial evidence as to guilt or innocence of a criminal charge:

> Guilt must be established beyond a reasonable doubt and where the evidence is as consistent with innocence as with guilt no conviction can properly be had. Even participation in the offense which is the object of the

> conspiracy does not necessarily prove the participant guilty of conspiracy (Dahly v. U.S. (CCA 8, 1931) 50 F. (2) 37, 43).
>
> Whenever a circumstance relied on as evidence of criminal guilt is susceptible to two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inferences, guilt may be fairly deducible (Turinetti v. U.S. (C.C.A. 8, 1924) 2 F. (2) 15, 17; also cited in Dickerson v. U.S. (CCA 8, 1927) 18 F (2) 887, 893).
>
> In 16 C.J. 763 the rule is stated: "In order to sustain a conviction on circumstantial evidence, all the circumstances proved must be consistent with the hypothesis that the accused is guilty, and at the same time inconsistent with the hypothesis that he is innocent, and with every other rational hypothesis except that of guilt." Juries are not permitted in civil cases to speculate as to the negligence of the defendants; they should not be permitted to guess as to the guilt of a defendant in a criminal case (Leslie v. U.S. (C.C.A. 10, 1930) 43 F. (2) 288, 290).

At all events, the passage last quoted from Rogge's opening statement is pure argument and, in no sense, a statement of what the evidence he had to offer could possibly show. Under the rules of law cited above no jury was entitled to draw from Rogge's evidence as to Viereck's propaganda activities the inferences Rogge asked them to draw, or the inference that Viereck's motive was to cause insubordination in the armed forces as a means to overthrowing democracy and establishing Nazism in this country. The inference that Viereck's motive was to earn a living by propaganda to serve the German cause by keeping America out of the war was completely consistent with all of Rogge's evidence. This inference, or some other inference consistent with innocence, therefore, was the only one the jury was entitled to draw. The reader will note that we are not challenging Rogge's promised evidence against or about Viereck and Viereck's activities. We are merely pointing out that such evidence, of a purely circumstantial nature in relation to the charge, was completely consistent with a hypothesis of innocence of intent to cause insubordination in the armed forces.

Mr. Rogge:

When Lend-Lease was proposed, the evidence will show that the defendants got out a series of cartoons, using their own special technique. The cartoons showed Uncle Sam being crucified on a cross and tried to cause the American people and the American soldiers to believe that the Government was crucifying the people when, in reality, the defendants were crucifying democracy. The cartoons originated in Chicago, where the Bund and the defendant Elizabeth Dilling were the largest distributors. From Chicago cuts were sent to New York, to Kansas, to Los Angeles, and millions of the cartoons flooded the country. The evidence will show that almost every defendant in the indictment participated in the distribution of this same series of cartoons.

Comment:

These cartoons, three in number, had been put out in 1940 at the time of the debate on the Lend-Lease Bill, H.R. 1776, by Dr. Donald McDaniel, an ex-marine of World War I, having been executed by the artist Otto Brennemann, both of whom were named in the first and second indictments but dropped from the third. These cartoons were typical political cartoons in the most authentic American tradition. They were indictments of President Roosevelt's foreign policy before Pearl Harbor. One of them showed Uncle Sam nailed to a cross of gold inscribed with the label or tablet "H.R. 1776." The idea could hardly be said to have originated with the Nazis. William Jennings Bryan won his first nomination for the Presidency back in 1896 with his history-making speech which ended in a peroration that brought the Democratic Convention to its feet, as the silver tongued orator of Nebraska declared "You shall not crucify mankind on a cross of gold." Nothing could have been more in the American or the democratic tradition than political cartoons and public debate of national policies of this type.

Mr. Rogge:

To cast doubt in the minds of our soldiers as to the justice of the sacrifices that they were being called upon to make, these defendants continuously preached that the

Axis cause was just and that our own cause was dishonest. They continually preached that the Axis powers were always in the right and the democracies were always in the wrong. According to the defendants, not the Axis powers, but the democracies, were the aggressors. When our relations with Japan, a member of the Axis became strained, the defendants championed the cause of Japan rather than the cause of America. After Pearl Harbor, they even stooped so low as to assert that our Government deliberately invited the sneak Japanese attack upon Pearl Harbor.

Comment:

These statements by Rogge against the defendants are highly inflammatory in time of war. Yet it is difficult to see how any opponents of a foreign policy leading to war can avoid exposing themselves to the same sort of charges should this policy be followed by their government and should the result be its eventual entry into war. John T. Flynn, in a pamphlet entitled *The Truth About Pearl Harbor* and published in late 1944, as well as a member of the British Cabinet in a public address during the war said substantially what Rogge here imputed to the defendants. Utterances of a far more radical nature than those described by Rogge were declared by the Supreme Court in the Hartzel decision, already quoted from, to lie within the bounds of the permissible, even in wartime.

Mr. Rogge:

Now, ladies and gentlemen of the jury, I have not tried to cover this full case. If I were to attempt to summarize all the evidence the Government will expect to introduce as to any of the defendants, it would take me a great deal more than the two hours that I have planned that this opening statement would take. It took a little bit longer than two hours, but I wanted to do no more than give a brief outline of the nature of the case in order that you ladies and gentlemen may understand and follow the evidence from the time the first witness takes the stand.

You have been sworn as jurors to try this case. The trial, because of its nature, will not be short. I know that you will be making many personal sacrifices.

The Government is going to submit to you that the evidence establishes beyond a reasonable doubt, that all of the defendants are guilty as charged.

Comment:

And so ended the opening statement of the prosecutor. It contains everything any one need know about the government's case to arrive at the conclusion that the case was not susceptible of proof. The evidence provided no surprises, thrills, sensations or even newsworthy material. Therefore, the press gradually dropped the Trial and stopped covering it, with the exception of some two or three reporters who remained to the end. It was a trial in which the prosecution case could be judged entirely on the prosecutor's opening, and found wanting.

CHAPTER XIV.

ARGUMENT IS NOT EVIDENCE.

Rogge and his backers, the people behind the Sedition Trial, no doubt thought his opening magnificent. The statement said exactly what they had in mind and about everything they had in mind in connection with the Trial. But argument, denunciation and inflammatory pleading for a conviction do not add up to evidence of guilt of having conspired to cause insubordination in the armed forces.

The government's case would have been susceptible of easy presentation within a reasonable length of time had the following two conditions existed:

First Condition: If the Nazi party had officially announced as its end the Nazifying of the entire world by use of the unlawful means of undermining the loyalty of the armed forces everywhere. If there had ever been such a public announcement, as Rogge said in the indictment there had been, it could have been proved in five minutes by the production in court of a duly authenticated Nazi document, or copy or translation thereof. To try to prove the existence of such a publicly announced policy of the Nazis in any other way, or by the processes of inference on inference and deduction from deduction from a vast showing of Nazi literature, newspapers, oratory and history, was to undertake a task impossible within the framework of trial by jury.

Second Condition: If each defendant could have been shown either by direct evidence or his own admission to have been a member of the Nazi party, already proved by evidence to have been a world conspiracy to Nazify the world by the unlawful means of causing insubordination in the armed forces everywhere.

Proper evidence proving the existence of the first condition, proof of which was a prime requisite for the government's case, would have taken the form of quotations from Nazi official literature similar to those used in the Dunne case (138 F. (2) 137) or to those cited by Chief

Justice Stone in his dissenting opinion in the Schneiderman case (320 U.S. 118) as constituting proof of the devotion of the party in question to the overthrow of the government by force and violence and to the causing of insubordination in the armed forces. However, note well, in the Schneiderman case, in spite of such evidence against the Communist party, the majority held that it did not warrant the denaturalization of Schneiderman for belonging to the party, the majority holding that:

> Utterances of certain leaders of the party organizations in question, advocating force and violence, are not imputable to the defendants. . . .
>
> The Court can not say that the Government proved with requisite certainty that the attitude of the Communist party in the United States in 1927 towards force and violence was in the category of agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, rather than a mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time, not calculated or intended to be presently acted upon but leaving the opportunity for general discussion and calm reason.

To have made out a case in the Sedition Trial equal to the case the minority, but not the majority, of the Supreme Court found sufficient in the Schneiderman case, the government would have had to show, against the Nazis, quotations similar to those we here cite from Chief Justice Stone, Justices Frankfurter and Roberts concurring therein, as having been produced in evidence against the Communist party, namely:

> Advocacy of illegal conduct generally was accompanied by the advocacy of particular types of illegality. The party was instructed to arouse workers to ''mass violation'' of an injunction ''whenever and wherever an injunction is issued by courts against strikers.'' (8)

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(8) The 4th National Convention of the Workers (Communist) Party of America. Page 107. This was part of a resolution adopted unanimously by the party convention relating to party policies for trade union work.

> In the literature of the period now in question unlawful tactics were to be particularly directed towards government armed forces. In addition to "systematic unlawful work," "it is especially necessary to carry on unlawful work in the army, navy and police." (9) Refusal to participate in "persistent and systematic propaganda and agitation" in the army was "equal to treason to the revolutionary cause, and incompatible with affiliation with the Third International," (10) and this because "It it necessary above all things, to undermine and destroy the army in order to overcome the bourgeoisie." (11)

Chief Justice Stone further said:

> There is abundant documentary evidence of the character already described to support the Court's finding that the Communist party organizations of which petitioner was a member, diligently circulated printed matter which advocated the overthrow of the government of the United States by force and violence and that petitioner aided in that circulation and advocacy. From the beginning and during all times relevant to this inquiry, there is evidence that the Communist party organizations advocated the overthrow of capitalistic governments by revolution to be accomplished, if need be, by force of arms.

The minority went on to cite excerpts from exhibit 26, or *The Statutes, Theses and Conditions of Admission to the Communist International,* page 28, as follows:

> The class struggle in almost every country of Europe and America is entering the phase of civil war. . . . A persistent and systematic propaganda and agitation is

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(9) Statutes, Theses and Conditions of Admission to the Communist International. See Note 6 supra, p. 19.

(10) Ibid. p. 28.

(11) ABC of Communism, p. 69. This was written by N. Bucharin & E. Preobraschensky, in 1919, translated into English in June, 1921 and published between 1920 and 1924 by the Lyceum—Literature Department, Workers Party of America, 799 Broadway, New York City. There was evidence that this pamphlet was a basic work of Party study classes in 1924 and 1925; that it was expressly designed for such purposes and was officially circulated by the Party and was still advertised by the Workers Library Publishers in 1928. Petitioner testified that he had read the work and was familiar with it, although he said that the authors had later been expelled from the Communist party.

> necessary in the army, where communist groups should be formed in every military organization. Wherever, owing to repressive legislation, agitation becomes impossible, it is necessary to carry on such agitation illegally. But refusal to carry on or participate in such work should be considered equal to treason to the revolutionary cause, and incompatible with affiliation with the Third International.

Now if the government in the Sedition Trial had had as evidence quotations from Nazi literature identical or similar in purport to those the government produced against the Communist party in the Schneiderman case, the government would have had a case and one that could have been completed within a fairly short period of time. The trial then would have turned on the ability of the government to prove that each defendant joined the Nazi world conspiracy thus established. This would still have been impossible in the given state of the evidence. However, the government would not have had to spend months introducing evidence from which to infer what was categorically stated in official communist publications put in evidence in the Schneiderman case, but there held to be insufficient to sustain denaturalization of a Communist party member.

Proving participation in a political conspiracy is no easier than proving membership in a political party. Rogge thought to substitute proof of membership in a world movement for proof of participation in a specific conspiracy to cause disloyalty in the armed forces. To do this, he made his concept of a world movement the equivalent of the conspiracy he had to prove to fit the law of June 28, 1940.

We must talk for the moment in terms of membership in a political party since we have no basis in past court decisions for talking, as Rogge did, in terms of a political "*movement.*" Proving membership in, or affiliation with, a political party has to be easy and rapid or it is not possible and should not be attempted. In support of this generalization, the authors have only to cite the recent Supreme Court decision in the seven year old Bridges case (U.S. Supreme Court. No. 788. October Term, 1944- June 28, 1945). For seven long years the government tried to prove Bridges a member of the Communist party in order to deport him as an alien who was a member of or affiliated with an organization committed to the overthrow of the government by force and violence and to causing insubordination in the armed forces. The attempt ended in failure for the simple reason that the evidence to prove Bridges a member of the Communist party was never sufficient. Dean Landis of Harvard Law School once so found in a report he made for the government. The Supreme Court found likewise in a decision which ended the case, after seven years of what Justice Murphy called a ''monument of man's intolerance to man'' or a judicial characterization which buries for all time Attorney General Biddle's claim to having been a believer in or respecter of civil liberties.

Under any fair administration of the law it must always be possible for certain persons to be secret members or affiliates of a political organization like the Communist party without this fact being susceptible of satisfactory proof for legal purposes. But it is better to let ten guilty persons escape punishment in a matter of this nature than to punish one innocent person. If any individual's membership in an unlawful organization or party constitutes a public danger or a social evil, it should always be possible in such a case to obtain evidence of some unlawful act, activities, or utterance or publication on the part of that individual involving criminal intent on his part, entirely aside from the mere fact of his membership in or affiliation with the allegedly unlawful party.

Thus, in the case of the Communist party—and here the authors are only following the doctrine laid down by the Supreme Court in the Schneiderman case—if the individual charged with being a member of an allegedly unlawful organization deserves punishment, it is because evidence can link him with the commission of some unlawful act or the intention to commit it, which might be merely an act of words or the advocacy of the overthrow of the government by force and violence or tampering by words with the loyalty of the armed forces, in either case, in a way clearly to show intent and clear and present danger (Hartzel v. U.S. 320 U.S. 756). The point is this: it is the fact that an individual does or intends to do something unlawful in connection with his membership in or affiliation with an allegedly unlawful party, organization or group, and not the mere fact that he belongs to the organization, party or group called unlawful that merits punishment. In other words, it is necessary to prove the commission of some unlawful act or action with intent to commit an unlawful act. As the court said in the Dunne case, "what the court and jury do is ascertain whether the organization has such forbidden purposes and whether such requisite knowledge exists, and these must appear beyond a reasonable doubt before a conviction can be had."

Here it is to be stressed that the laws aimed at membership in allegedly subversive political organizations like the Communist party in connection with the naturalization, denaturalization or deportation of aliens and in the Smith Act of 1940 do not name these organizations but rather describe and define the alleged acts of unlawful propaganda. Acts thus defined are the teaching and advocating of the overthrow of the government by force and violence and the counseling, advising, urging or causing of insubordination in the armed forces. These acts are denounced as crimes. If the Communist party is an unlawful organization, it is only because it advocates, teaches or causes the commission of these particular crimes.

Now it so happens that the Supreme Court has never passed on the question of fact whether the Communist party is an unlawful organization or whether it does advocate the overthrow of the government by force and the impairment of the loyalty of the armed forces. And it may well happen that the Supreme Court will never find itself compelled to pass on this issue of fact. If the Communist party were guilty of carrying on a criminal campaign of the character just indicated, that campaign might be ended and with it the Communist party or that phase of its activities, so far as this country was concerned, by the simple procedure of prosecuting and convicting, not the Communist party but certain individuals, namely, the officers, agents or members of the party responsible for such criminal activities. Here it is to be emphasized that they would then be convicted and sentenced, not for having belonged to a criminal or subversive organization, to wit: the Communist party, but for having carried on a criminal program. Their acts and their intent, not their membership in a political party or movement, would convict them. The leading cases decided recently by the Supreme Court are, as already indicated, the Schneiderman and the Bridges cases. Schneiderman was denaturalized for being a member of the Communist party and Bridges was ordered deported for allegedly having been affiliated with the Communist party. The Supreme Court reversed Schneiderman's denaturalization and the order for Bridge's deportation. Schneiderman admitted he was a Communist party member. Bridges denied it. In neither case did the Supreme Court pass on the question whether the Communist party had the criminal purposes of overthrowing the government by violence or causing insubordination in the armed forces. The Communist party has never been convicted or cleared in this respect. And it may never be.

In the Schneiderman case the Supreme Court held the evidence did not show Schneiderman personally guilty of advocating violence or military insubordination even though he did belong to the Communist party, and that such membership did not make him guilty of intent to commit every political act of violence or subversion of military morale which might or might not have been discussed approvingly and theoretically in official Communist party literature. The Supreme Court took the view that Schneiderman's conduct was on trial and not the Communist party.

In the Bridge's case the Supreme Court merely held that the evidence was insufficient to prove that he was a member of or affiliated with the Communist party. And the Court made it clear that it did not hold with any theory of proving an individual's membership in a party by "piling inference on inference." That, of course, was Rogge's method of proving the defendants were members of his hypothetical "world movement."

Parenthetically, it might be remarked at this juncture that there was another case, the Dunne case (138 Fed. (2) 147), already discussed at some length, in which the Government, unlike Rogge in the Sedition Trial, had evidence to support a charge of conspiracy to cause insubordination.

In the light of the preceding analysis and discussion, based on these recent decisions, it seems obvious that, to sustain a conviction on the indictment, the government would have had to prove not merely the two propositions already stated, i.e., that the Nazi party was officially committed to the conspiracy charged and that the defendants belonged to the Nazi party, but also a third proposition. We now list the three propositions the government would have had to prove beyond a reasonable doubt to sustain a conviction under the indictment:

First Proposition: The Nazi party was a world-wide conspiracy to Nazify the world by the use of the unlawful means of undermining the loyalty of the armed forces. (Here the conspiracy consists of the agreement to use the unlawful means of undermining the loyalty of the armed forces to the end of Nazifying the world.)

Second Proposition: The defendants were members of the Nazi party or its agents.

Third Proposition: The defendants, whether members or agents of the Nazi party, agreed and acted on that part of the alleged Nazi world conspiracy which called for causing insubordination in the armed forces.

It would be necessary, according to the Supreme Court's reasoning in the Schneiderman case and according to the law of agency, to prove either that the defendants as Nazi party members participated knowingly in a conspiracy to cause insubordination in the armed forces or that they, as Nazi agents, were in an agency agreement with their prinicipals to try through propaganda to undermine the loyalty of the armed forces.

Now it takes no great amount of gray matter to see that if the government could prove the third proposition, it would have not the slightest need of proving the first or the second proposition. In other words, if the defendants conspired with intent to cause insubordination, it would not matter in the least whether they did so as members or agents of the Nazi party or as individuals with no Nazi links whatsoever. If they did not so conspire, it would not matter in the least that they were members or agents of the Nazi party or any other party. All the government had to prove was conspiracy to cause insubordination in the armed forces. If it could prove that, nothing else mattered. If it could not prove that, nothing else mattered.

In the preliminary arguments over the indictment, defense lawyers argued strenuously that all references in the indictment to the Germans, the Nazis, the Nazi party and a world movement to Nazify the world by means of undermining the loyalty of the armed forces be stricken therefrom. Defense lawyers asked that the defendants be tried only on the charge of having conspired to violate Section 1 of the Act of June 28, 1940, or to undermine the loyalty of the armed forces with intent to impair their morale.

The prosecutor opposed with even greater vigor these pleas to the trial judge to de-Nazify the indictment and the prosecution case, limiting both to a charge of violating the law under which the case was being brought. The judge sided with the prosecutor. The prosecutor's main contention was that, while bringing the Nazis into the case was in the nature of surplusage or "window dressing," and though the offense charged was that of conspiring to undermine the loyalty of the armed forces and not that of conspiring to Nazify the world, it was necessary for the prosecution to drag in the Nazi world conspiracy to show intent on the part of the defendants to cause insubordination in the armed forces. In other words, Rogge argued that to prove the third proposition he had first to prove the first and second propositions. The fact was, of course, that if he could not prove the third proposition without first proving the first and second, he could not prove the third at all.

In the given state of the known evidence, it was impossible to prove that the Nazis ever formed a world conspiracy to Nazify the world by means of causing insubordination in the armed forces; and it was equally impossible to prove that any of the defendants were members of the Nazi party. But, had the defendants conspired to cause insubordination in the armed forces, it should have been possible to find some evidence of this particular conspiracy.

Contrary to his expectations and assumptions, Rogge was required by the defense from the beginning until the end of the trial to prove his first and second propositions, neither of which was susceptible of proof in the given state of the evidence. He undoubtedly assumed that no defense lawyer would question any conspiracy alleged against the Nazis. And he thought through a little trick of dialectics or playing with words to get around the difficulty, or rather impossibility, of proving that the defendants were members of the Nazi party. This he would do by the substitution of "Nazi movement" or "world movement" or just "movement" for the more exact term "Nazi party." He knew he could not prove either that the defendants were members of the Nazi party or that they had conspired with each other to cause insubordination. The Nazi party was a corporate entity, having a roll of members and the usual formalities and records of a political organization. But a Nazi world movement was simply a figure of speech, a thing of Rogge's imagination, a concept, a definition. As Jerome Frank says in his latest book, *Fate and Freedom* (p. 306): "True merely means that you have stuck to the rules. In pure mathematics, one says, 'If you assume this and that, what then?' "In the game of pure mathematics or pure logic, (1) self-consistency and (2) simplicity of basic assumptions—the axioms—are the primary demands'." Rogge's assumptions were simple and his case, with some notorious slips due to his ignorance, was largely self-consistent. Rogge created by the processes of assumption and definition a world movement to fit Hitler, the Nazis and all the defendants. Well, any logician knows that one can create a definition or a concept to include whomever and whatsoever one will and to exclude all one wishes to exclude. It is all in the wording of the definition or concept.

If the judge allows the prosecutor unlimited time in which to build up the structure of his definition, the prosecutor can make it appear as complete and perfect as any metaphysical structure or piece of fiction can be made. And Rogge had a good mind. This concept of a world movement to take the place of the reality of the Nazi party, Rogge thought would take the place of proof that the defendants with intent to impair their morale had conspired to undermine the loyalty of the armed forces. It was devilishly clever and had every chance of success in wartime, had the defense not asked questions and made continuous objections.

Rogge had good reason to expect success. He could reasonably count on a defense which would say: "Of course, there was the Nazi world conspiracy the government charges, only my client was not in it. He was not a Nazi.

He was a good anti-Semite.'' Or, ''He was a good anti-communist.'' Or, ''He was a good isolationist.'' As a matter of fact, at the beginning of the Trial this was exactly how a large majority of the defense counsel felt about defense strategy. They reasoned as Rogge had hoped and calculated they would. They said, in effect: ''I won't question anything bad the government may say against or about the Nazis. To do so would not only seem unpatriotic in wartime but it would also prejudice the jury against my client who is not and never was a Nazi. I'll concede anything the government may say against the Nazis and confine my defense to showing that my client was not in the Nazi world conspiracy charged.''

Now whenever a defendant in a criminal trial stakes his liberty on his ability to prove a negative, he is usually licked unless his negative consists of a perfect alibi. An alibi, however, is possible only where a person is charged with having committed a specified act at a specified time and place. Against such a charge it is sometimes possible to prove that the defendant could not be guilty as he was somewhere else at the time. But in the case of the charge in the Sedition Trial, covering two decades in time and the entire planet in space, no one could possibly prove an alibi. Anyone could have been a participant in such a conspiracy.

At the beginning of the Trial only some two or three defense counsel, two of whom are joint authors of this book and one of whom was both a defendant and his own lawyer, saw that it would be fatal for the defense to waive a contest of the government's historical thesis about the Nazis. Before the trial ended, this minority had grown to a large majority of the twenty-odd defense lawyers. This original minority had the advantage of prior knowledge of the history involved, something the average citizen lacks. What is more important, they understood that if the defense admitted the historical allegations of the government, which were palpably false or contrary to the consensus of expert historical opinion and hence unprovable, and if each lawyer confined himself to trying to persuade the jury that his particular defendant was not in the alleged conspiracy, the natural conclusion for the jury to reach would be that all were guilty and endeavoring to lie out of it. The only defense in the nature of an alibi would have been to show that a given defendant had come out for a policy looking to war on the Nazis and all aid to the Allies before America entered the war. And that was one thing that could not be proved on behalf of a single defendant.

The government's case was similar to the Protocols of Zion, the famous and much disputed anti-Semitic document which makes the learned elders of Zion the world over the members of a sinister Jewish world conspiracy. Now if a Jew were being tried for participation in this world conspiracy, his only defense would be to try to show that no such conspiracy could ever be proved to have existed, or that the allegation of one was a great hoax or fraud. If the jury believed in the Protocols of Zion, it would convict any Jew charged with participation in such conspiracy. Little would it avail a Jew to plead that, while there was such a Jewish world conspiracy, he was a good Jew who would not join any such thing. Anybody who believes in the existence of such a conspiracy is little likely to believe that there is such a thing as a good Jew. The fact that he was a Jewish intellectual, financier, philanthropist, writer, statesman or personality of unusual distinction, would in no way help to clear him. It is precisely such Jews who best fit into the Protocols of Zion theory.

To be guilty of participation in the Protocols of Zion world conspiracy, it is enough that the accused be a Jew and that the jury believe in the Protocols. To be guilty of participation in the Rogge world conspiracy, which he admitted during the trial was a world movement of ideas, it was sufficient for any defendant to hold some of the ideas making up the world movement of ideas.

It was necessary for the defense to challenge the world conspiracy or Protocols-of-Zion-in-reverse thesis, not only or chiefly because the thesis was false and unprovable, but mainly because it was necessary to force the jury to do some critical thinking, if any defendant was to be acquitted. The indictment and the prosecutor's opening statement were inflammatory and full of appeal to patriotism, to the emotions and to prejudice. The defense had to rely on an appeal to reason. Once the defense turned the Trial into a historical debate, the historical thesis was beaten.

No normal jury would send men to the penitentiary for ten years on their opinion as to the merits of two opposing historical theses.

Of course, if the government's case had consisted of evidence of the commission of substantive acts, even of utterance, against the loyalty of the armed forces, the trial could not have been turned into either a historical debate or a farce. The government posed the affirmative of a historical debate in Rogge's opening statement. Defendant Dennis, following immediately, posed the negative. The debate was on. For a trial not to be a historical debate, the prosecution must present a case that is not a historical thesis. The defense cannot start a historical argument if it has to meet charges based on evidence of unlawful acts committed by the accused.

It might be said that the defense could have noted certain general objections to the entire government case and then sat back quietly until it was over, leaving it to defense time to demolish the government's historical thesis or to persuade the jury that the thesis was irrelevant and immaterial. Nothing could have been more fatal for the defense in a case of this kind. The presentation of the government case was essentially a course in indoctrination and propaganda for the jury, carried on for months. If such a course had been allowed to go on for several months, uninterrupted, what would have been the likely effects on any average jury? The probabilities are that the members of the jury would have succumbed to the prolonged and uninterrupted course of suggestion, propaganda and indoctrination to which they would have been subjected continuously over a period of months by the evidence and argument of the government. It is not human for any average group of men and women to resist a daily dose of propaganda and indoctrination which is unbroken and unchallenged by counter-propaganda.

In a long conspiracy trial it is axiomatic that a defense, to succeed, must offset impressions on the jury when and as made. If the defense allows such impressions to pile up and crystallize in the minds of the jury over a period of a year while the government case is being put in, the defense will not be able, when the government is finished, to go back over that entire case and undo all those impressions. Consider only the practical or mechanical difficulties of referring back to government testimony given several months or a year earlier. The jury will have forgotten the details of such testimony. It will retain only impressions. To deal with these, the defense would have to recall the government's evidence and rebut or try to explain it away piece by piece, some four to eight thousand pieces in all. A defense of that nature would be a practical impossibility. Catching this glimpse of the obvious, a few defense counsel saw that they had to correct for the defense any false or unfavorable impression created by government evidence at the time the impression was made. It was then or never.

The psychology of it all may be explained by the use of an illustration. Suppose some thirty individuals were placed at the bottom of a deep well. If a load of heavy bricks were dropped on them, they would all be killed instantly by the impact. If, instead, load after load of sand, soft dirt or just feathers were dumped on them until the well was filled up, one of two results would follow, depending entirely on how the victims at the bottom of the well behaved as others were attempting to bury them alive. If they remained perfectly still, the first few loads would not hurt them or even seriously inconvenience them; but, eventually, they would all be suffocated as the soft material gradually filled up the well. If, on the other hand, these thirty persons at the bottom of the well trampled down and kept on top of whatever material was being poured on them in the well, they would come out unharmed by the experience. When the well was filled up they would be standing on top, smiling, as were the defendants when the Sedition Trial ended.

If the government had had any real evidence, it would have been able to insure convictions for all in a few days of testimony. The government had no such evidence—no heavy bricks. All it had was the equivalent of feathers—irrelevant evidence that could only create prejudice and cause confusion in the minds of the jurors. Piece by piece such evidence seemed to many defense lawyers harmless and useless for the purpose of proving the charge. This feathery evidence was introduced ostensibly to sustain the historical thesis, the backbone of the prosecution case, though really its function was to create prejudice against the defendants and confusion about the factual issues of criminal intent and clear and present danger.

To get a quick and easy conviction on any kind of real evidence against twenty odd native born Americans named in the indictment, there was absolutely no need to drag in Hitler, the Nazi party and their history for two decades, either into the indictment or the evidence. But, linking native anti-Semites, anti-communists and isolationists with the Nazis as a piece of propaganda or public education was the big idea and the main purpose of the people behind the Trial. To get and sustain convictions on the charge, it was necessary only to show that the defendants had wilfully conspired to cause insubordination in the armed forces with intent to destroy their morale. If they had done that, their own actions and words would have furnished some proof of such criminal intent and clear and present danger therefrom. It would not have taken the actions and words of Hitler and Hitler's followers over two decades to prove such criminal intent and clear and present danger.

CHAPTER XV.

PICKING THE JURY.

We have given more space to the purposes and people behind the Sedition Trial and to the instrumentalities chosen to serve them than we shall give to the courtroom events or the action of the Trial itself. We have done this because the purposes and people behind the Trial and the instrumentalities, such as law, indictment, prosecution theory and prosecutor, chosen to serve these purposes and people behind the Trial have far greater historical and social importance than the events of the Trial. The Trial as an event, or rather a series of day to day events, was not without its human interest. However, it quickly lost interest for the press, as we have already pointed out, because the government had no case and no evidence to fit the law or the charges or to make news. Anti-Semitism, anti-communism and isolationism may have been deemed terribly wicked and shocking by the people behind the Trial and by their instrumentalities in the courtroom. But, as the press and jury quickly perceived, anti-Semitism, anti-communism and isolationism are not news. The press could quit the Trial. The jury, like the defendants, could not.

Because the evidence never fitted the law or the facts, the Trial never became what might be called a battle of wits. In so far as it was a contest, it was one in assertion and counter-assertion, in propaganda and counter-propaganda, and in suggestion and counter-suggestion with regard, not to the guilt or innocence of the accused, for that never occupied anyone's mind in the courtroom during the Trial, but mainly as to the relevancy of the evidence and the question whether the government had a case to support its charges.

The press reports and radio comments about the Trial as an event in the courts have given currency to many false impressions, the most erroneous of which is that the defendants made a farce of the Trial by their disorderly conduct in the courtroom. This impression is confirmed by statements such as the one attributed by the New York newspaper PM to the Attorney General to the effect that, in a new trial which, he said before his resignation was accepted, he was going to start up, the defendants would not be allowed to repeat what he called "their Nazi tactics," used in the first trial. On this point the record must speak for itself.

Several attorneys were fined for contempt of court by reason of their words spoken in the courtroom. One defendant, Ellis O. Jones, acting as his own counsel, was also fined for contempt and another defendant, Lawrence Dennis, acting as his own counsel, was admonished by the Court. Two other defendants, Robert Noble and Edward James Smythe, were admonished in connection with their insistence on their right to represent themselves, a right the court held neither was capable of properly exercising. In the case of Noble, the court had excluded from the case his attorney, James Laughlin, because the latter had filed with the House of Representatives a petition for the trial judge's impeachment. The exclusion of Laughlin was appealed by him. The Court of Appeals sustained the trial judge by a three-to-two vote, the minority taking the same position taken by Laughlin that he was within his constitutional rights as a citizen in filing the impeachment petition and that this exercise of every citizen's right did not furnish the trial judge with grounds to exclude him from further participation in the case.

When his attorney had thus been barred from his further defense, after having spent months on its preparation, Noble asked the trial judge to be allowed to conduct his own defense, as defendants Dennis and Jones were doing. This the judge denied, insisting that Noble forthwith replace Laughlin with another attorney without holding up the case, or accept right away one of the court's naming. Noble, not unnaturally, said he found it impractical to get a lawyer overnight and against his best interests to accept a lawyer the judge might impress into serving in the case.

As for the judge's ruling that Noble was incompetent to exercise his constitutional right to defend himself as Dennis and Jones were doing, it is to be remarked that Noble had conducted a political campaign for election as governor of California and had received several hundred thousand votes. After the trial judge had thus deprived Noble of his attorney, denied his right to represent himself and forced on him a lawyer not of his own choosing, Noble refused to confer with this lawyer or recognize him, and, on every occasion the latter rose to speak for him, Noble also rose to repudiate him. A few days of this and the prosecutor moved to sever Noble from further participation in the Trial. Whatever may be thought of Noble's action in this matter, it can hardly be called obstreperous or disorderly. Noble invariably addressed the Court in a quiet voice and a respectful manner. According to the court, of course, he had no right to address the court at all, but only to be represented by a lawyer not of his own choosing, a lawyer forced on him by the court. There is strong legal ground for saying that Noble had the right he claimed to represent himself as well as to object to the appointment of a lawyer to defend him new to the case, who was unacquainted with the nature of his defense and who had missed so much of the testimony offered and received in evidence.

Apart from the above, the record is bare of any evidence of censurable conduct by the defendants. Certainly the record will not support the charge that the defendants were responsible for the farcicality of the Trial or its inordinate length. As a matter of fact, the behavior of the defendants, as actors in the court room drama, was always negligible as a factor in comparison with the behavior of the respective attorneys. The lawyers held the stage. The defendants were only spectators, in no way distinguishable from the public present at the Trial, except, perhaps, in that they conferred occasionally with their attorneys, as was natural and proper.

When a criminal trial of any size or complexity opens there are usually routine matters of legal procedure to be disposed of and then the court gets down to the first major business of the Trial, that of picking a jury. Ordinarily, this takes a day or two at most. In the Sedition Trial it took exactly one month. The Trial opened April 17. The prosecutor delivered his opening statement on May 17. The reasons were not the perversity of either defense lawyers or defendants. Among the reasons was an error by the prosecutor which caused the judge to disqualify an entire jury venire of over a hundred possible jurors. Another reason was the fact that scores of potential jurors disqualified themselves by stating that they had formed an opinion about the case which would take evidence to change.

An initial difficulty was the size of the courtroom. It was the largest courtroom in the District of Columbia. But it had not been built for a mass trial of thirty defendants with over a score of lawyers, to be covered by another score of press representatives and enough of a public to make it a public trial. Each defendant with his lawyer was entitled to a desk or table space on which to keep books and papers and make notes. Each reporter also wanted table space. In spite of great efforts and a complete rearrangement of the courtroom, the final result was an overcrowded condition which heightened resentment on the part of the unpaid and court appointed lawyers. They were not disposed to be sympathetic with the judge's difficulties, for they correctly reasoned that there was no necessity to include more defendants in one trial than available facilities would comfortably accommodate.

On the prosecution theory, the government could just as well have picked a hundred or ten defendants for its indictment. In the Dunne case, the government picked twenty-nine to try; in the Sedition Trial, thirty. It has been reported in connection with the war guilt trials under discussion at the time of writing this book that the Department of Justice considers thirty about the right number for a mass trial. If all the defendants were members of a single group, having one leader and one general policy, and if they would agree on a single defense, which one lawyer could direct, assisted by other attorneys, a mass trial of this sort might be conducted more expeditiously than one in which each defendant properly and logically insists on a separate defense, having had no ties or interests in common with any other defendant. It is unfair as well as futile to ask that people who never were co-conspirators act during a conspiracy trial for the convenience of the prosecution as though they had been co-conspirators.

The space difficulty at the beginning disappeared after a few weeks of trial for the following reasons: the press stopped coming because the government had no evidence that was news—anti-Semitism is not news; most of the defendants stopped coming, many, in order to be out earning a living; many of the defense lawyers would arrange with their colleagues in the Trial to look after their clients during their absence, with the result that all the lawyers were rarely in attendance at one time. One of the authors of this book had a perfect record of attendance; the other one was present at more sessions than most defendants or lawyers.

Another difficulty or unpleasant condition at the beginning of the Trial was that of a tense courtroom atmosphere. It soon disappeared after the defense opening statements and the first defense cross examination. At first, the courtroom bristled with deputy United States marshals carrying guns and blackjacks in plain sight. Some of the lawyers objected that there was too much show of force around the courtroom. It was not long, however, before marshals, defendants, members of the press and members of the jury were on an intimate, folksy basis. When the Trial, along in the fourth month, went on a matinee basis, with hours from 1 to 6 P.M., so as to give the unpaid lawyers a chance to earn a living in the morning, there were two intermissions in the afternoon, one of ten and the other of twenty minutes. These intervals were passed by lawyers, defendants and jurors in a little cafe across the street from the courthouse. Defendants and defense lawyers were often embarrassed by having members of the friendly jury speak to them and start up conversation. By that time the members of the jury had come to regard themselves as co-victims with the defendants and the unpaid defense lawyers of a judicial or courtroom farce of interminable length.

The spirit of comradeship dominated the entire courtroom, except for the judge and the prosecutor. The judge often tried his best to be one of the club, but was never quite able to get in. On every occasion that either author of this book went up to his Honor outside of the Trial periods, he was greeted with a warm and friendly handshake. But the judge could not qualify for membership in the Sedition Trial club. For that, one had to regard one's self as an involuntary participant in what one considered a foolish proceeding. The judge, obviously, could not qualify, since he could have stopped the Trial any time he saw fit.

A main cause of tension at the beginning of the Trial which quickly disappeared was the fear of most of the defendants that some of their co-defendants, whom they did not know, might be guilty and that evidence of such guilt might tend to create prejudice against them. Probably only one of the defendants, who is a joint author of this book, really understood the government's case—rather lack of a case—from the outset, and, consequently, had no fear of it. This defendant, Lawrence Dennis, dismissed his counsel just one week after the Trial started or three weeks before the selection of the jury was completed. He felt that at the outset he could use a lawyer to get himself broken into the routine of trial procedure. He knew from the start the government's case and had no fear of it since he knew its major historical allegations, which were pure assumptions and were demonstrably false or unprovable. He had lined up several experts and historians, who had written volumes about the Nazis, ready to take the stand in refutation of the government's historical thesis. For advance knowledge of the government's case, Dennis was indebted to a six hours conference with Rogge in the Department of Justice several months before the indictment was returned and while Rogge was still indoctrinating the grand jury. In the entire Trial Rogge pulled no surprises but ran his case strictly according to the theory he disclosed to Dennis in that conference.

Probably not one of the defendants and only one of the defense counsel had made the pre-trial analysis of the government's case and the prosecutor's mental state with regard thereto that Dennis had made. Consequently, both defense counsel and defendants believed and expected during the first few weeks of the Trial that the government must have some evidence against some of the defendants. They could not believe that Rogge had disclosed his whole case in his opening statement and that there was nothing more to it except piling up testimony and pieces of paper in attempted support of his unprovable historical and interpretative thesis. They said, "We must wait and see what evidence the government has."

Those who understood the case from the start told the others when Rogge had finished his opening statement that that was all there was to it except the stuffing and that the stuffing was just a huge mass of light, airy feathers.

As the Trial wended its weary way through the weeks and months, the latter kept on repeating, "We told you so. That is all there is to it."

Those who, at the beginning, had too much respect for the federal government to believe it capable of putting on a mass trial, press agented all over the land, without real evidence to support the charge, gradually came around. By the end of the second month, the defendants were no longer afraid of the prosecution case or of what might come out against fellow defendants whom they did not know. Once they reached the conclusion that the government had no evidence and no case to fit the law or the charge, the defendants began to reflect confidence and a lack of concern over what might come out about their co-defendants. Those who had the Trial correctly sized up from the start constantly pointed out that if the government had facts to support the charge, it would not waste time posing the thesis and submitting the sort of evidence Rogge was doing.

Picking the jury took a month instead of the usual day or two. The process brought out well before the Trial started the lack of unity or partnership among the defendants. The judge, who had discretion in the matter of allowing additional peremptory challenges to the ten allowed by statute to every defendant in a criminal trial, under federal rules, held that the thirty defendants should have only the statutory ten peremptory challenges. Dividing ten among thirty at once presented a problem. When the judge tried one method of forcing the defense lawyers to agree on an exercise of a peremptory challenge, calling on defense counsel Koehne to exercise his challenge, the seventy-five year old, dour-faced attorney slowly rose and solemnly informed the court that he challenged the three-twenty-ninths of the upper anatomy of juror number three. He apparently wanted to reserve some of his challenge for another juror. Although jurors and attendants laughed, the judge was not amused and promptly fined Koehne $50 for contempt.

The judge would have greatly expedited matters by exercising his discretion to allow each defendant at least one peremptory challenge. But any attempt to force the defense lawyers to unite or act as one was foredoomed to failure. This was one contest in which it would not have been correct for the defense to say, "In unity there is strength." But the defense never fought among themselves. They fought only with the government, but as twenty odd combattants, each acting separately, not as one united defense. That was one great element of defense strength. Twenty voices are better than one or two in a contest of this sort.

Once the jury had been chosen after a month wasted on the process, the next in order of business was the prosecutor's opening statement, which we have already given in full with our comments. It seemed appropriate to give at the outset the prosecutor's opening statement along with our presentation of the instrumentalities which the government used in this Trial to serve certain purposes and people behind the Trial. The rest of the story of the Trial is largely concerned with Rogge's carrying out of the task set for himself in his opening and our showing how and why our comments on his opening were well founded.

There was no need for any testimony or evidence after the delivery of Rogge's opening statement to enable any person well informed about the subject matter to reach a verdict on the entire case. Rogge promised to give no real or relevant evidence to prove the charge, and, in seven months of trial, he gave none. The fact that he promised no evidence to prove the charge should have sufficed to cause a termination of the Trial after his opening.

As soon as the prosecutor had concluded his opening statement, it became the privilege of each counsel to make for his client if he so chose an opening statement. Defendant Lawrence Dennis was fifth on the list, but four attorneys ahead of him reserved the making of their statement so as to allow him to lead off for the defense. This he did in a two hour statement. It was begun about three o'clock, the afternoon following the day Rogge made his opening. Dennis had to suspend at four o'clock. As it was a Thursday, Dennis did not conclude until the following Monday noon. Thus he spoke as long as the prosecutor. Unlike Rogge, who read his statement, Dennis delivered his extemporaneously, using only the indictment and the court record of Rogge's opening for notes. After Dennis concluded, Attorney Dilling, on behalf of Mrs. Dilling, spoke for forty-five minutes. Attorney Lindas on behalf of defendant Viereck spoke for thirty-eight minutes. Attorney Klein spoke for twenty-eight minutes for defendant Sanctuary. And defendant Jones spoke for himself for forty minutes.

Dennis' opening sounded the keynote of the defense for the entire Trial by making a frontal attack on the government case, charging that the facts fitted neither the law nor the charge, or, in other words, that the government had neither a case nor evidence to support the charge. From then on, the defense was a continuing attack on the prosecution, in which each defense lawyer participated in his own peculiar way. *The remainder of the Trial was spent trying this charge against the prosecution rather than the government's charge against the defendants.*

Such defense strategy is rarely followed or possible to follow in a conspiracy trial. The usual thing in a large conspiracy trial is for some defendants to plead guilty and for counsel for the rest to admit, at least tacitly, the existence of the conspiracy alleged and each to try to persuade the judge and jury that his particular client never joined or participated in the conspiracy, or that the evidence had failed so to show. In such cases, a few defendants may get directed verdicts of acquittal; a few get acquittals from the jury; but the majority get convicted.

In a few conspiracy cases the existence of the conspiracy is proved beyond doubt. More often, it would be impossible to prove. But some defendants being guilty of offenses other than the one charged and hoping to obviate further prosecution, plead guilty on advice of counsel as a gesture of prudence, expediency and good will.

Generally speaking, whenever the case for the existence of the conspiracy charged is not ironclad, it would be a lot easier for each defense lawyer to make out a good case against the possibility of ever proving the conspiracy as charged by any evidence available than to make out a case for the negative proposition that his particular client was not in the conspiracy. Some negatives, though entirely true, are utterly impossible to prove. One should never try to prove a negative one does not have to prove. But, as a rule, most of the people put in conspiracy indictments as defendants are guilty of certain offenses which the prosecutor knows he cannot prove against them, though these defendants are not so sure of it, so he charges a lot of them with a conspiracy in the hope that some will plead guilty and that the impression that all are guilty will be gathered by the jury both from such pleas and from a lot of prejudicial evidence against each defendant. Many who are convicted on conspiracy charges are doubtless innocent of that particular charge, though guilty of something else, which, however, cannot be proved against them. Any lawyer having a conspiracy case to defend would be well advised to read carefully this book.

Any calculations by the prosecutor based on the above stated general rules of experience as to conspiracy trials were quickly dashed by Dennis' opening. The prosecution went on the defensive at this point and remained on the defensive throughout the Trial. This, of course, was not a result of Dennis' opening statement but of the government's lack of evidence to support the criminal charge on which it was forced by the defense to try the case. In outlining this defense, Dennis did not speak for any defendant but himself; nor did he speak for the defense lawyers as a whole. At no time during the entire Trial did any lawyer have authorization to speak for any others than those he was representing. The defense had no senior lawyer or spokesman.

The consensus of defense counsel opinion probably was, at the time of the making of the opening statements, that the defense would have to wait until the government had finished its case before a defense could be outlined. Dennis insisted that all the defense needed to know was to be found in Rogge's opening; that in this statement was to be found the government's entire case; and that it was an impossible case to sustain against cross examination of government witnesses.

It is only fair to Rogge to say that his opening and his entire prosecution were brilliantly conceived and executed —but only with a view to pleasing the people and serving the propaganda and intimidation purposes behind the Trial. Against a good defense, they were hopeless. Against a bad defense, they might have secured convictions, which, of course, would have been reversed on appeal like those in the cases of Hartzel and the twenty-four Bundists, if the case had not been rendered moot by a presidential pardon granted after the war was over and before the two years necessary for the printing of the long record and preparation of appeal briefs had passed. Rogge did what was expected of him and of the Trial. He did a magnificent job of dialectics in which he linked the defendants with the Nazis and the Nazis with all anti-Semites, anti-communists and isolationists. For the people behind the Trial, that job was worth the price of admission. Getting good convictions would have made the job perfect. But that was impossible against a good defense under the rules of evidence.

CHAPTER XVI.

PRESENTING GOVERNMENT EVIDENCE.

When we tell our readers that the record in this case ran to nearly eighteen thousand pages, plus over one thousand exhibits, some of which consisted of books containing several hundred printed pages, they will readily understand why we cannot give even a meager abstract of the evidence or a list of the exhibits with sufficient description of each to make it meaningful to the reader. The best we can do, as a practical matter, with the evidence, which was only that of the government and not half of what the government had to present to complete its case, will be to give a general idea of what the evidence was all about, as a whole, and one or two samples.

If the prosecution had a plan in the presentation of its evidence, it does not appear from the record. Roughly speaking, the evidence was about one-fourth concerning the German-American Bund in the United States, one half about the Nazis in Germany and the remaining fourth consisted of odds and ends about various ones of the twenty odd native American defendants.

A reason why the presentation of the evidence has to seem planless and disordered was the natural desire of Rogge to make accommodation to the personal exigencies of his several witnesses who had been assembled from all over the United States and some of whom had been kept waiting for weeks in the overcrowded nation's capital. So it frequently transpired that a principal government witness would be on the stand off and on for over a month during which period his direct examination by the government and cross-examination by the defense would have been interrupted by the introduction of testimony by several other witnesses as to wholly unrelated matters. A very natural consequence was to make the already great confusion of the government's evidence worse confounded. No wonder members of the jury would remark to defendants with whom they exchanged friendly greetings and comments during brief intermissions from the court room comedy of errors that they, the jury members, were still trying to figure out what it was all about.

The government started off with witness Peter Gissibl, a former member of the German-American Bund who was on the stand on the following dates: May 23, 24, 25, 31, June 1, 2, 5, 6, 7. Another Bund official, Luedtke, testified on the following dates: June 14, 21, 22, July 12, 13, 17, 18, 19, 20, 24, 25 and September 12. The two weeks summer vacation, about which a government attorney remarked that he wondered whether they would get one every year, had intervened during this witness' testimony. The jury members had insisted on this vacation, some of them to return to their respective businesses for that period and thus allow their employees or associates to take a long-planned vacation. If the evidence of witnesses thus on and off the stand over several weeks had had any relevancy to the charge, how could the jury have remembered it all well enough to weigh it for the purpose of arriving at a reasoned conclusion or verdict?

Gissibl had helped the government in twenty-two denaturalization and other cases against his former compatriots in the German-American Bund. He admitted that he hoped that he, unlike his former associates against whom he had turned state's evidence, would not be denaturalized. Several government key witnesses who followed Gissibl, including ex-Bundists, like Luedtke and Winterscheidt—the latter being on parole on a sentence for a morals charge —indecent exposure—which had caused his expulsion from the Bund—and scholarly Dr. Hermann Rauschning, an expert on things Nazi, having once been a top-flight Nazi himself, and having more recently been on the pay roll of Hollywood as a Nazi expert, had all been star witnesses for the government in several other trials of their German compatriots.

Ex-Bund official Luedtke had turned state's evidence in the government's case against the twenty-four German-American Bundists, whose conviction as a result partly of Luedtke's testimony was reversed by the Supreme Court on the ground of insufficient evidence. This reversal, of course, came only seven months after the Sedition Trial had ended in a mistrial. In the light of that reversal, on the insufficiency of this evidence, it seems warranted to say that a fourth of Rogge's evidence, namely, that about the Bund, would have to be ruled out and never should have been admitted. Rogge introduced his voluminous evidence about the history and activities of the Bund on the theory that, in his own words, the Bund "was the spearhead of the Nazi movement" to cause insubordination in the armed forces. The Supreme Court's finding on the same evidence given against the Bund in the case of the twenty-four Bundists flatly contradicted this statement of Rogge's. Since the Supreme Court has finally disposed of this evidence, finding it did not show the Bund "engaged in illegal activities," having been, however, pro-Nazi, pro-German and opposed to many policies of the President, it would seem unnecessary for us to waste any time on this fourth of Rogge's evidence.

As for evidence about the Nazis, about half of Rogge's material, the reader can find most of it in any large university library. It would take several volumes the size of this book to give the gist of all the testimony and all the documents, consisting of books, pamphlets, posters, newspapers, letters, post-cards, memoranda, invoices or bills of sale for literature, not one piece of which was in any way unlawful, and all sorts of mere slips of paper. Hundreds of these exhibits were selections from German language newspapers, some printed in Germany and some in the United States.

One exhibit which wasted several days of court time was a list containing over 50,000 names of addressees of publications mailed in Axis countries. The list had been prepared under the supervision of a customs collector on the Pacific Coast through whose port of entry these publications of Axis origin addressed to persons in the United States had passed before Pearl Harbor.

A cursory glance by defense counsel through these lists of names quickly disclosed that many of the addressees were persons whose names appear in *Who's Who* or the Congressional Directory. They were government and state officials, statesmen, legislators, cabinet officials, justices of the United States Supreme Court, college presidents, professors, authors, radio commentators and columnists. The name of Mrs. Eleanor Roosevelt was there. Because the names of a few defendants figured in the compilation, the judge admitted the list in evidence.

No attempt was made by the government to prove or suggest that the addressees of these Axis publications had ever ordered or subscribed to them. Doubtless some had, though, unquestionably, the majority had not. Days and days were wasted on this piece of evidence which could prove no more against the defendants relevant to the charge than it proved against the wife of President Roosevelt or against thousands of the most distinguished men in the nation.

This was Rogge's way of linking the defendants with the Nazis. Obviously, as evidence of a conspiracy to cause insubordination among the armed forces, it was just what the defense counsel Jackson so often called it, namely, "trash." No attempt was made to show or even suggest that a single piece of the periodical and other publications thus received by certain defendants from Axis countries before America entered the war had anything whatever to do with advocating or causing insubordination in the armed forces.

As piles and piles of bound volumes of German newspapers were identified and introduced in evidence to permit Rogge to read selected extracts from each volume showing certain things about the Nazis he wished to emphasize for the purposes of confusing the issue and prejudicing the jury, defense attorney Bilbrey, a Washington lawyer of long experience both as a former United States attorney and a criminal lawyer, would wearily rise and declare that if such collections of newspapers could constitute evidence for the purpose of proving the conspiracy charged against the defendants, he would have to learn law and the rules of evidence all over again.

In no single instance did any piece of evidence about either the Nazi party or the German-American Bund relate in the remotest way to the advocacy of insubordination in the armed forces anywhere. Whatever the literature of and about the Nazis in Germany or the Bund in America may have proved, was a matter only for scholars, historians, political scientists and sociologists to argue about. Agree on an interpretation of so vast a panorama of history, they never could or would.

One of the worst examples of abuse in this respect is to be found in the spending of an entire day by the prosecutor reading into the record an account from a German source of Hitler's Beer Hall Putsch, way back in 1923. As every one knows, this Putsch failed and landed Hitler in jail. What made this piece of evidence absurdly irrelevant in this Trial was the equally well-known fact that, after the failure of the Beer Hall Putsch in 1923, Hitler made it his publicly announced and consistently observed policy not to repeat that mistake but to plan and work to come to power exclusively by legal steps, which the government experts in the Sedition Trial admitted he had done.

In trying to create prejudice against the extinct German-American Bund, Rogge went so far as to introduce in evidence and wave before the eyes of the bored jury Nazi flags, colors, insignia and even buttons used by the Bund in its meetings and organizational activities in which the Supreme Court found no illegality. For doing the same thing, the prosecution was rebuked by the Supreme Court in its reversal of the conviction of the twenty-four Bundists, three of whom had been made defendants in the Sedition Trial. Said the Supreme Court in that case (Keegan v. U.S. Decided by the United States Supreme Court June 11, 1945; 89 Lawyers Edition No. 17, page 1314):

> Indeed a question arises whether it was not an abuse of discretion to permit the Government to go, at such inordinate length, into evidence concerning the Bund and its predecessor, the Friends of New Germany, during a period of seven years prior to the inception of the alleged conspiracy; and concerning Bund uniforms and paraphernalia, and pictures and literature in the possession of various defendants.

It was obvious that evidence merely proving that the Bund was a pro-Nazi organization had no place in a case in which the defendants were charged with conspiracy to cause insubordination in the armed forces.

Most of Rogge's evidence of a historical character was incontrovertible in the sense that it is usually incontrovertible that a given book or newspaper was published by whom appears on its face and that the writer is the person so named. There were, however, some documents, in the forms of copies of alleged originals, of highly dubious authenticity. Though none of these related to insubordination in the armed forces, yet they were prejudicial by reason of the Nazi character they bore.

On May 31, 1944 Donald Patterson, an employee of the Library of Congress, took the stand in response to a subpoena duces tecum. He had brought with him from the Congressional Library five letters which he identified as being photostat copies of five letters there on file. The subpoena, dated April 17, 1944, called for the "originals" of these five letters. The letters submitted by this witness were only photostat copies and not originals. To meet this difficulty, the prosecution had introduced into evidence government exhibit 2001 b, House of Representatives document No. 538, entitled "Letter from the Clerk, House of Representatives, transmitting a copy of a summons received by him from the District Court of the United States with reference to papers now in the possession of the House of Representatives with regard to Joseph E. McWilliams et al."; and also introduced into evidence government exhibit 2001 c, being House Resolution 508, dated April 19, 1944, authorizing "the Clerk of the House" to appear in answer to the subpoena duces tecum "with certified copies of the documents and papers mentioned in the said subpoena, but shall not take with him any papers or documents on file in his office or under his control or in his possession as Clerk of the House."

All this was irregular and appeared rather strange to defense counsel St.George. So, on cross examination of this witness, St.George asked three questions: "Are these letters produced by you copies of the the originals?" The answer was, "No." "Have you the originals?" Answer: "No." "Then these letters, which you produced in response to the subpoena duces tecum, are merely copies of copies on file in your office?" Answer; "Yes."

Of course St.George immediately moved that the letters in question be denied admission into evidence. However, the court denied the motion and permitted these copies of letters, which do not exist, to go into evidence.

The fact that the prosecution went to such pains to hide the non-existence of the originals caused St.George to become suspicious. Then, over the week end he received reliable information that these letters might be forgeries, that they were rigged by the Anti-Defamation League and that the originals did not exist. So, on the opening of court, on Monday, June 6, attorney St.George, in open court and before the jury, charged that these letters which the court had permitted to go into evidence were forgeries; that they had been rigged by the Anti-Defamation League; that there were no originals and that Rogge knew that such were the facts. Neither Rogge nor his assistants denied these accusations. St.George again moved to exclude these letters from the jury. The court promptly denied the motion. Then St.George moved that if the House of Representatives would not permit the taking of these letters into court on a subpoena duces tecum, the court and the jury should go to the House to inspect the files, stating that they would find that there were no originals. This motion, also, was promptly denied.

The letters in question, of course, had no probative value so far as the charge of the indictment was concerned. They merely tended to show what everybody knew about the Bund, namely, that it was pro-Nazi and had ties of blood and sympathy with the German fatherland. In every batch of government evidence or every single piece of it introduced separately, it was the argument over the relevancy and admissibility of the evidence rather than the evidence itself which received most attention from the jury. The eventual reading by the jury of the exhibits or the reading of them to the jury by Rogge was always the boring anticlimax of heated argument over their relevancy and admissibility.

Instead of presenting evidence about the alleged Nazi world conspiracy comparable to the evidence submitted in the Schneiderman case against the Communist party—which was held by the Supreme Court insufficient to denaturalize Schneiderman for being an admitted communist—the prosecution tendered evidence like the following to prove that two defendants joined and furthered the world conspiracy charged:

Government Exhibit 3401. (This was a photostat of two
sides of a one cent post card)
March 10, 9 P.M. 1939

Aryan Book Store (H. Diebel)
634 W. 15th St.,
Los Angeles, Calif.

Reverse Side—

Dear Patriotic Friend:

You ought to have a copy of the splendid new book, "Odyssey of a Fellow Traveler", by J. B. Matthews, who was one, and whose anti-Communist testimony before the Dies Committee was such a bomb-shell to the Red forces he formerly served. Send to us for a copy: read it, and pass it on to your friends.
Price $1.00

Elizabeth Dilling, Director.
Patriotic Research Bureau,
53 W. Jackson Blvd.,
Chicago, Illinois.

The above communication from one defendant to another was a piece of promotion by Mrs. Dilling of a new book by J. B. Matthews, who for several years after the publication of this anti-communist tract served as a full time employee and expert of the Dies Committee for the Investigation of un-American Activities. This piece of anti-communist propaganda contained not a word susceptible of being construed by any reasonable person as having the remotest connection with a violation of the law of June 28, 1940 against propaganda to cause insubordination in the armed forces or with the advocacy of Nazism, against which, incidentally, there was no law. It goes without saying that Mr. Matthews would not have been hired for several years as an expert by the Dies Committee if he had been writing propaganda to cause mutiny in the armed forces.

The fact that the government's case against the native American defendants was made up entirely of evidence similar to that shown in the above example is conclusive proof that the government's case was unrelated to the charge of the indictment. Consider carefully this post card. Both defendants, the sender and the addressee, might have been guilty of the charge, or of having conspired with each other and with other defendants to cause insubordination in the armed forces, yet the mailing of this particular post card by one defendant to another could in no conceivable way have proved or even tended to prove such guilt. The point is that defendant Dilling's solicitation of another defendant to buy the anti-communist book of the chief investigator of the Dies Committee was no different, so far as proving the charge was concerned, from a post card by Mrs. Dilling soliciting another defendant to buy Walt Disney's *Snow White.*

The submission of this piece of evidence revealed, like the submission of over a thousand other pieces of similar probative value, that, according to the prosecution theory, the propagation of certain ideas or themes, such as anti-communism, anti-Semitism, so-called, or isolationism, constituted proof of the commission of the offense of conspiring to cause insubordination in the armed forces. What we wish here particularly to direct the reader's attention to is the difference between the type of evidence submitted in the Sedition Trial and that offered in the Schneiderman case or the Dunne case to support about the same allegation, namely, that the movement or party in question was committed to certain specified types of illegality such as causing or trying to cause insubordination in the armed forces.

Inasmuch as a full third of the government's case had to do with anti-communism, whether of the defendants, the Nazis or the German-American Bund, and inasmuch as it was a part of the prosecution case that this propaganda parallelism proved guilt of conspiring to cause insubordination in the armed forces, we offer for comparison a few quotations from Winston Churchill, along the same line, similar to scores of quotations from the defendants and the Nazis put in evidence in the Sedition Trial:

In the British campaign of 1919 Winston Churchill said on November 1:

> Of all the tyrannies in history, the Bolshevist tyranny is the worst, the most destructive, the most degrading.

> It is sheer humbug to pretend that it is not far worse than German militarism. The miseries of the Russian people under the Bolshevists far surpass anything they suffered even under the Czar.

If the readers are inclined to think the defendants used violent language in their anti-communist propaganda, let them sample the following quotations from Winston Churchill. On February 2, 1919, he said:

> Although Russia now lies prostrate in the bloody clutches of the Bolshevist baboon, be sure of this—Russia will arise. . . . The Bolshevist plague will pass . . . Like other great pestilences which have tormented mankind, it will, even if no external remedy is applied, abate its fury, and the survivors will long be immune from a recurrence of the disease.

On June 22, 1919 Winston Churchill said:

> They (the Bolsheviks), too, aim at a world-wide and international league—but a league of failures, the criminals, the unfit, the mutinous, the morbid, the deranged and the distraught in every land; and between them and such order of civilization as we have been able to build up since the dawn of liberty there can be neither truce nor pact.

Five years later Churchill, in September 1924, had the following to say about our and his democratic allies in the present war:

> Judged by every standard which history has applied to men's affairs, the Soviet regime is one of the worst and vilest tyrannies. For that rule we are asked to become responsible by making it possible to be continued by lending money to that very government.

On October 21, 1924, Churchill said:

> If this country commits itself to a loan to Russia, it will assume responsibility for the crimes of the Soviet Government. It will have made itself accessory and accomplice with the foul deeds, and it will have taken on its shoulders a load of shame and degradation which the honour of this country will never support.

Nine years later, on April 20, 1933 when the Tory "National" Government of 1931 had suspended negotiations for a new Anglo-Soviet Commercial Agreement, Churchill had the following to say about Soviet Russia, with the aid of which Britain and America are now to insure the peace and welfare of the entire earth:

> We have traded with cannibals under proper precautions, but that we should give credit and facilities to this foul, reptilian regime which we deny to friendly civilized countries—surely that should stop here and now.

Less than a year before the present war started, or on October 16, 1938 Churchill said:

> A Communist or a Nazi tyranny are the same things spelt in different ways.

And while Britain was at war with Germany Churchill had the following compliments to pay our gallant Soviet ally on January 20, 1940:

> The service rendered by Finland to mankind is magnificent. They have exposed for all the world to see, the military incapacity of the Red Air Force. Everyone can see how communism rots the soul of a nation; how it makes it abject and hungry in peace and proves it base and abominable in war.

In the Sedition Trial the government introduced hundreds of pieces of evidence showing that the defendants and the Nazis said the same things that Winston Churchill said about the Soviet regime. So much for Churchill's having followed consistently over a twenty-year period the Nazi line that Soviet Russia is reprehensible. Let us consider what he said along the Lasswell-labeled theme that "Nazi Germany is just and virtuous" which the defendants in the Sedition Trial were supposed to have re-echoed. In a speech on November 11, 1938, or less than a year before Britain declared war on Nazi Germany, Winston Churchill had the following bouquets for Hitler which were as sweet as any shown by Rogge's evidence ever to have been thrown at the Fuehrer by any of the defendants:

> I have always said that, if Great Britain were defeated in war, I hoped we should find a Hitler to lead us back to our rightful position among the nations.

In his book, *Great Contemporaries,* Winston Churchill said of Hitler:

> Those who have met Hitler face to face in public business or on social terms have found him a highly competent, cool, well-informed functionary with an agreeable manner and a disarming smile.

We ask the reader to keep in mind the above quotations from Churchill when they reach our chapter on Lasswell's method of proving propaganda parallelism as a means to sustaining the government's allegation that the defendants were members of a Nazi world movement of ideas. The evidence of the government was identically similar in purport, so far as anti-communism is concerned, with the above-quoted utterances of Winston Churchill. And, quantitatively, about a third of the government's evidence merely showed that the Nazis and the defendants were anti-communists, just like Winston Churchill, who, apparently was in the same world movement of anti-communist ideas.

Along the line of evidence showing anti-communism and pro-Fascism, a witness from whom the government expected great things proved a boomerang. This was witness Henry D. Allen, who was kept on the stand for over a week. At the high point of his testimony, the senior Washington lawyer in the case, E. Hilton Jackson, remarked to his colleagues: ''The government's case is dead. All it needs now is to be buried.'' For the benefit of readers who may not be lawyers, it should be explained that, in a trial, the side putting on a witness is bound by what that witness testifies, unless counsel for that side, as a result of the witness' testimony, say they are surprised and announce the intention of impeaching their witness. One cannot vouch for a witness and submit what one likes in his testimony and then try to discredit what one does not like.

The witness Allen had been a member of Pelley's Silver Shirts. He had also been active in anti-communist crusading activities on the Pacific Coast. He was a mining engineer in the sixties, of old New England stock. As a result of his anti-communist crusading activities and certain minority-group pressures, he had been ordered excluded from the Pacific Coast area and thus forced to abandon his professional livelihood. A similar order by the military authorities against a German-American citizen had been set aside by a Philadelphia judge as invalid. It goes without saying that this experience had not made witness Allen sympathetic to the prosecution or hostile to those against whom he was being called on to testify. A prosecutor would never have put on a witness as hostile as Allen unless he were mighty hard up for testimony.

All that Allen was able to testify to against the defendants was that some four or five of them had expressed to him opinions that would, for purposes of brief generalization, be called anti-communist, anti-Semitic and pro-Fascist. What made Allen so dangerous for the government was the fact that he, himself, had held and still held the same views, for which reason he was then being punished by military exclusion from the Pacific Coast area and an opportunity to exercise his profession. Thus, throughout his testimony, both on direct examination by the government and cross-examination by the defense, Allen repeatedly used phrases like "Jewish communists." When asked by the judge what he meant, Allen readily obliged his honor with a profuse explanation in terms of the general theory of most of the defendants as to the relation between the Jews and communism. As Allen had been vouched for as a government witness, Rogge could not object to such opinion or testimony, unless the prosecution elected to impeach the government's own witness.

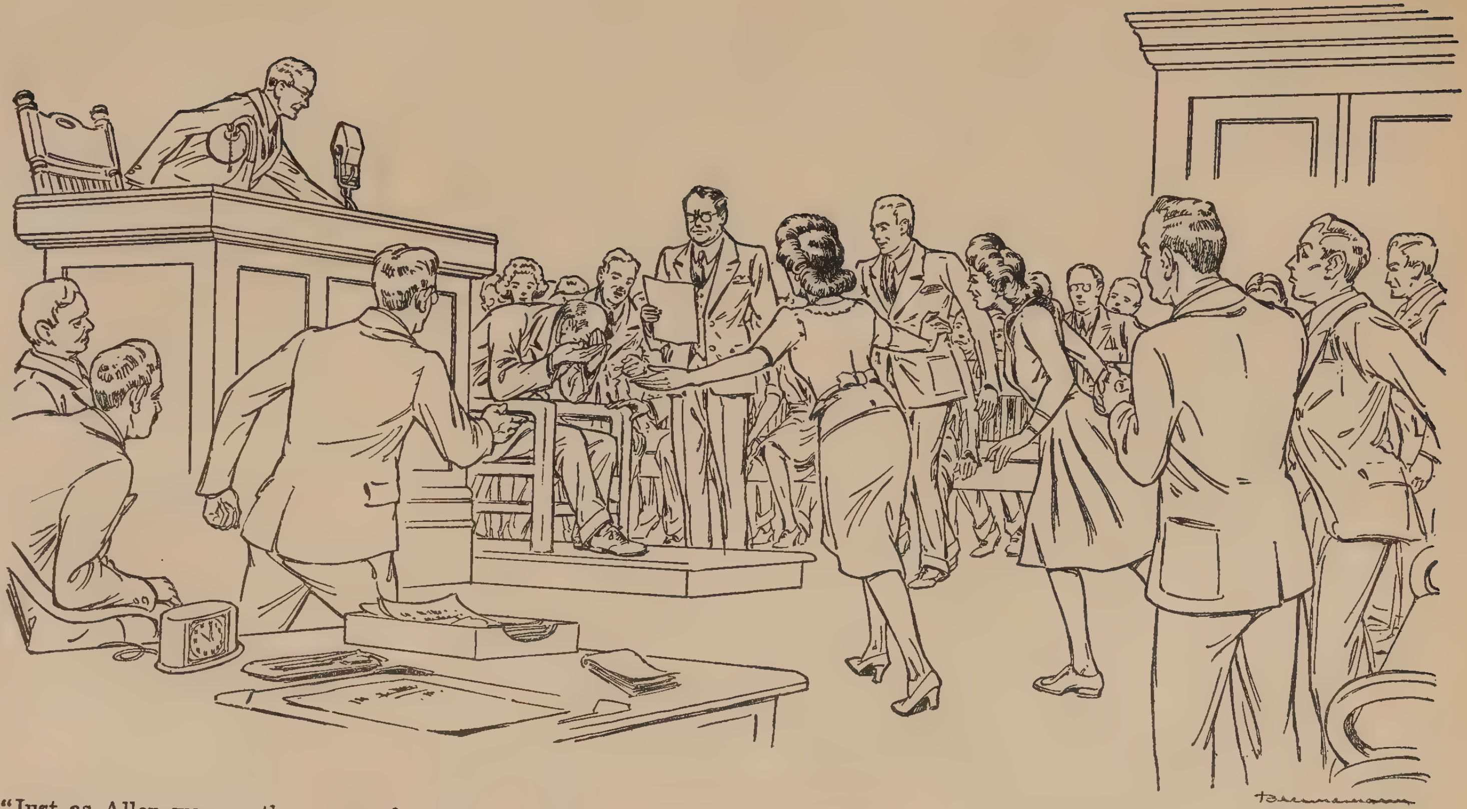
Of course, according to the view of the authors of this book, not a word of Allen's testimony should have been admitted, since it tended to prove neither that the defendants he mentioned were in any sort of a conspiracy nor that they had any intent to interfere with the loyalty or morale of the armed forces. Rogge put Allen on the stand to testify to expressions of opinion which Rogge expected would shock the jury into convicting the defendants on a charge unrelated to such shocking opinions. But, as Allen had identically the same shocking views, and justified them in his testimony, he was not calculated to shock the jury according to Rogge's calculations, but rather the reverse.

The climax of this colossal blunder of Rogge's came in the form of a highly dramatic episode during which the Court, on motion of a defense lawyer, recessed for ten minutes to give the jury time to dry their eyes over Allen's story of how he and his son had been beaten up by a gang of several persons whom the government's own witness described with warmth as "Jewish communists". This statement came in reply to a question on cross-examination by counsel St.George as to whether the witness had any reason to fear for his personal safety or the safety of those near and dear to him. When Allen reached the point in his reply at which he had to give the details of the assault by those he repeatedly called the "Jewish communists", he broke down and sobbed as he related how the just named assailants of his beat his son so badly that the latter lost the sight of one eye.

Just as Allen was on the verge of complete collapse on the witness stand, recounting the details of the assault on him and his son by the "Jewish communists" as he called them, his two very attractive twin daughters, apparently in their late teens, who were in court with their mother, rushed up to the witness stand and threw their arms around their father crying, "Oh, daddy." Seldom does a criminal trial furnish a scene as poignant and affecting. It was as spontaneous as it was theatrical. Rogge had asked for it by putting such a witness on the stand. And he got it. The defense could never have found as good a witness to justify or excuse the violent anti-communist and anti-Semitic utterances of certain defendants as the government obligingly put on the stand in Henry D. Allen. And, quite probably, had the defense attempted, when their turn came, to put on testimony of such a nature, the judge would, quite properly, have ruled it inadmissible as being irrelevant, as was all of Allen's testimony for the government.

The last witness, who was on the stand being cross-examined the afternoon of the day the judge died in his sleep, was Nicholas J. Roccaforte, a former employee of defendant Winrod. He was put on for substantially the same kind of testimony Allen had given about certain other defendants. Only Roccaforte was definitely a hostile witness against Dr. Winrod. Still he was unable to link Dr. Winrod either with an act or utterance remotely connected with advocating or causing insubordination in the armed forces or any relations whatsoever with the Nazis.

It was brought out that Roccaforte, a convert from Roman Catholicism to Pentacostalism, had gone to work for Dr. Winrod, an ordained minister of the gospel, in connection with the latter's religious work, which included the publication of a religious journal and the operation of a Bible shop. He testified that he had sold Bibles and religious books for Dr. Winrod; that he had worked with and for him in connection with Dr. Winrod's religious and political activities.



"Just as Allen was on the verge of complete collapse on the witness stand — his two attractive twin daughters — rushed up."

On the subject of Dr. Winrod's campaign for election to the United States Senate Roccaforte testified:

> As near as I can recall, he said after he had won the senatorial campaign, he would use that as a springboard, to use his exact words, to the White House.

This touched off an objection by Counsel Dilling that ,instead of proving a conspiracy, Roccaforte was proving the reverse, or that defendants Winrod and Pelley were at that time rivals for the office of President of the United States. To his objection, the utterly humorless Rogge replied, with the seriousness of which he could never divest himself, not being observed to smile once during the entire trial: ''That doesn't stop them from being in a conspiracy.''

Counsel St.George was moved to ask that this testimony be stricken on the ground that it might hurt the morale of all youth to learn that it was evil to aspire to be President, since St.George said he had been taught in grammar school that any boy might become President. Dennis brought out from Roccaforte that Winrod had been in missionary work among the Negroes and did not believe in the leadership principle—which struck Dennis as being odd for a man who was supposed to be an arch-Nazi world conspirator and, also, presidential timber. When Dennis tried to find out whether the witness had ever heard Winrod say anything about insubordination in the armed forces, causing or advocating it, or anything in that connection, Rogge was on his feet with an objection, which the Judge sustained. That was one subject that was absolutely tabu according to the prosecutor. It happened to be the crime with which all the defendants were charged.

CHAPTER XVII.

THE HUMAN FACTORS IN THE TRIAL.

What may be called the human factors in the Trial were many and varied. On the whole, they were overwhelmingly favorable to the defendants and consistently adverse to the government. This was due partly to the government's lack of a case and partly to a whole series of breaks for the defense. One might almost say that the defense got all the breaks so far as human factors were concerned. Even in the personalities of both the judge and the prosecutor the defendants got good breaks. Both were of German extraction and heavily and visibly endowed with certain characteristically German qualities, not the least of which is a lack of a sense of humor. When defense objections or arguments became too much for the judge, about his only weapon was the gavel. He could and did make attorneys sit down. But only by pounding the gavel. And to no purpose. One attorney would be hammered down. Another or several others would rise immediately to reopen the same or a similar issue. Neither the judge nor the prosecutor had a sharp tongue or the gift of repartee.

The judge suspended the Trial for an entire week in the second month while a defense attorney, James J. Laughlin, was haled before another judge on the prosecutor's complaint of contempt of Judge Eicher's court. Laughlin was found guilty and fined $150. The beginning of this contempt trial was heralded in the Washington papers with an announcement that "the antics of the Sedition Trial are now over" by order of Judge Eicher. He had got "tough" with the lawyers. The result of this disciplinary action against Laughlin was imperceptible in the Trial. And when, a little later, Judge Eicher, having failed with his contempt proceeding against Laughlin to make the latter behave as the judge thought he should, barred him from the Trial for filing an impeachment petition against the judge, the passing of Laughlin from the case was followed by the necessity of severing one of his clients and by no letup in the defense fight on the prosecution case.

The judge tried to be as human as he knew how, but his attitude became more and more one of grim determination as he found himself compelled to fight daily a battery of twenty odd lawyers stubbornly contesting every inch of the government's case. On one occasion, in an outburst of rather unjudicial candor, Judge Eicher complained, somewhat plaintively, to the lawyers that they were all against him, which was perfectly true. It is a terrific nervous strain for any man to oppose twenty approximate equals in a sustained contest of wills and opinions over a prolonged period. The strain is the greater if the one against the many has to preserve through it all an outward semblance of judicial calm and impartiality.

Several months after the death of Judge Eicher had ended the Trial, Justice Goldsborough, hearing a motion of Attorney Laughlin in respect to the then moot state of the Sedition case, which the government at that time was showing a marked indisposition to revive, remarked anent the little flurry he then observed in his own court between Rogge and all defense counsel that he had seen enough in those few minutes to convince him that the case could never be tried, if the atmosphere of that moment prevailed throughout the trial. And just that atmosphere did prevail during the seven and a half months of the Trial.

Justice Eicher had apparently made up his mind and refused to be shaken in the opinion that the government was entitled to try to prove its case on its own prosecution theory. This, of course, the defense contested, holding that the government's case and evidence did not fit the law or the charge. As the judge did not agree, his attitude got to be more and more, day by day, one of desperation.

It is easy to understand and rationalize the judge's attitude. The Sedition Trial was an administration "must." In a sketch of the Chief Justice of the Washington District Court, *Current Biography* in the 1941 issue said: "A 100% New Dealer from a normally Republican district, E. C. Eicher was on April 9, 1941 unanimously elected to succeed Jerome Frank as Chairman of the Securities and Exchange Commission." (This was following his failure to get re-elected to Congress.) "During his term he supported Roosevelt absolutely." From chairmanship of the SEC, the small town Iowa lawyer and ex-Congressman was appointed Chief Justice of the United States District Court in Washington. When it came his turn to sit in Criminal Court No. 1, he was called upon to conduct a trial which had been given more nation-wide pre-trial publicity and ballyhoo than any criminal trial in recent times. One of the court officials remarked to the authors of this book after the judge's death that the judge had seemed to him to take the same interest in this trial that a child takes in a new toy. And it turned the national spot-light for a brief moment at the opening of the Trial on the judge's court and function.

Only a few weeks before the judge's death one of the authors of this book called on him in chambers to obtain his signature for a request for a stack of books from the Congressional Library to use in cross-examining a government witness. The judge, as usual, was extremely gracious, complying with the request and detaining this counsel for a two hours talk about the case. The latter recalls the parting remark of the judge to the effect that his conscience was clear about the case. It was the sort of remark that one rarely hears from a judge about a case he is trying while the trial is going on. And it is a remark one hardly expects from a judge whose conscience is not bothering him. It was the feeling of many whose lives are spent around the Washington courts that the judge was the unfortunate victim of his zeal to play an important role and render a distinguished public service in a much over-publicized trial, the larger and deeper implications of which he never quite grasped, not being exactly a profound legal or social philosopher. There was also the feeling that he may have been the victim of his confidence in the Department of Justice.

For over a year the Sedition Trial had been a nearly weekly topic of mention in Walter Winchell's nation-wide radio broadcast, as well as coming in for almost daily mention over long periods in his column. Even serious publications like *Life* had given the Trial a play that ranked it in importance with a major international event. The Trial and its defendants never merited such publicity. The book *Under Cover,* smearing all the defendants and enjoying the weekly touts of Walter Winchell and the leftist press, had had a large sale for several months just prior to the filing of the indictment. It was doubtless too easily assumed that convicting people in a criminal court who have already been convicted in a book would be child's play for a smart prosecutor like Rogge. They forgot that a book like *Under Cover* and its author are not cross-examined by the many victims of its libels in the presence of each reader as he peruses the book.

The smear technique works only when the victim has no chance to be heard in his own defense. In brief, the case had already been tried in a one-sided press and the defendants had there been convicted. The more conservative people who prided themselves on their sense of civic responsibility merely added to their expressions of opinion about the case the hope that the defendants would be convicted in a dignified, orderly and eminently fair proceeding.

It would have taken a highly informed and radically minded person to have opined when the indictment was announced on January 5, 1944 that the whole thing was a political stunt in which the historical evidence according to the consensus of expert opinion contradicted the basic premise and allegation of the indictment; wherefore the guilt of any one named in the indictment was to be doubted on the solid ground that if the defendants had actually conspired as charged to cause insubordination, it would have been neither necessary nor expedient for the government to make the basis of its charge certain preposterous and unprovable historical assertions about the Nazis and a mythical Nazi world movement of ideas which was not the Nazi party or anything concrete or tangible.

In this connection, the authors pause to comment on the state of the Federal Judiciary and the politically run Department of Justice under Attorney General Biddle. We pass no judgment. We merely point to the record, already mentioned, of no less than five leading civil liberties cases that have gone to the Supreme Court during the present war, with the result that five times that high tribunal has found that the Department of Justice has sought and obtained judgments and the lower federal courts have ratified judgments which were not supported by sufficient evidence. Surely this record suggests that the lower courts as a whole and the Department of Justice in particular have not been all that the people have a right to expect of them.

Ordinarily in a sensational criminal trial the big human interest factor centers around the defendant or defendants. Not so in the Sedition Trial. Here the two dozen defense lawyers stole the show or held the center of the stage and were, throughout, the big human interest factor of the Trial. It is fair to assume that Judge Eicher did not pick lawyers with this result in view. Only a successful Hollywood producer could be assumed to have picked deliberately such a cast for such a show and with such success. Clearly, the success was not that of the judge who picked the lawyers or of those who had picked the judge.

About the only valid generalization that could be made about the court-appointed score of defense lawyers would be to the general effect that they were all different and that their selection had been made with no thought of having them all measure up to any one standard. For instance, most of them were not familiar with criminal law procedure at all. Only three or four claimed to be. Since Judge Eicher had little of the showman in his Iowa-Mennonite background, it is reasonable to assume that in selecting the cast of defense lawyers he acted with the same general incomprehension of what it was all about that most defense lawyers freely remarked among themselves characterized the making of many of his rulings in the case.

But, as it turned out, Judge Eicher's selections of lawyers for the defendants were singularly happy for the general cause of the defense though most unhappy both for the government's cause and the judge's health and nerves. The latter found himself in a more or less permanent state of emotional and verbal conflict with the lawyers he had selected for the defendants.

Having in mind the ancient aphorism that comparisons are odious, the authors restrain themselves at this point and do not embark on an attempt to compare and describe different defense counsel. All of them contributed something to the defense. Most of them made valuable contributions to the defense though in entirely different and, in some instances, highly novel ways. Certainly no lawyer, whatever his experience and skill, and probably, even, no Hollywood producer would have foreseen the result and selected a balanced cast of lawyers to produce the court room drama these lawyers enacted. That Judge Eicher picked such a cast and got such a result from his appointees, may be considered by some an act of Divine Providence and by others a lucky break for the defendants. It cannot be supposed that Justice Eicher, like his illustrious patron in the White House who put him on the Washington bench, had "planned it that way."

Ordinarily, lawyers do not tend to humanize a court proceeding. They rather tend to formalize it. But in the Sedition Trial even attorneys of high professional standing contributed amazingly to the dramatizing and humanizing of the Trial. Some were just out of law school. One, William Gallagher, was a professor in a local law school and a skilled criminal and trial lawyer.

The venerable seventy-five year old Koehne stretched full length on his bench and slept for spells during the Trial. Nights, he had to sit up with his aged and ailing wife. But periodically, when the Trial needed a shot in the arm, he would wake up and rise to deliver a quaintly mid-Victorian protest against what he would characterize as some sort of violation of the Sixth Amendment to the Constitution. His reasoning and his delivery were in no sense senile. Often his reasoning was quite acute. Another counsel, the inimitable Ethelbert Frey, was the life of the party. One of his proudest possessions, now adorning the desk of his law office, is a group photo of the entire jury, affectionately inscribed to him by each of the twelve members and two alternates. Whenever the Trial was getting dull he would come out with a lively objection, an almost invariable feature of which was the earnestly pronounced observation: "Your Honor, that is just another New Deal trick." That line always made a hit with the jury which contained few New Dealers. The judge and the prosecutor, both New Dealers, did not relish it.

Claude Thompson, a Virginia gentleman of the old school, was so sincere, scrupulous and insistent as a champion of civil liberties that he repeatedly drove the judge to the point of desperation. A few contempt fines, which the judge tried experimentally on this southerner of the old school, only made matters worse for the judge. At one time he threatened to exclude Thompson from further participation in the case. Since Thompson was serving as joint counsel with William Gallagher for two German defendants in custody and wholly without compensation, his exclusion from the case would have been in the nature of a high reward for him rather than a punishment, though, undoubtedly, he would have contested it right up to the Supreme Court on appeal. Listening to Claude Thompson, one was carried back to the stirring public debates of ante-bellum days, as he would flash back at the court a line like the following: "Your Honor, I am from Virginia. You appointed me to defend these two Germans and, by God, Sir,I am going to defend them to the best of my ability." Sometimes he would throw in something about that earlier and most illustrious Virginian, Thomas Jefferson, also a great champion of human rights and civil liberties who fought for the repeal of the first Sedition law to disgrace the administration of federal justice. Thompson often spoke with a passion for civil liberties that made one feel that he was trying to carry on the tradition of Jefferson.

It is safe to say that all defense counsel at various times clashed with the trial judge and that all severely criticized in open court his rulings, which, with rare exceptions were adverse to the defendants. The criticism of a number of defense attorneys at times verged on the contemptuous. It remained for J. Austin Latimer, a reserved, dignified Alabaman, to pronounce what was perhaps the severest rebuke given the judge during the entire Trial, and to do so without, for the moment, being aware of what he was doing. After a ruling by the judge which seemed to Latimer particularly raw, he quietly arose and in a voice that broke as he spoke said, "Your Honor, I was never so mortified in all my life," referring to the ruling. The judge turned white, raised his gavel and was about to say something, perhaps to impose another one of his two hundred dollar fines for contempt, when his attention was distracted by the ever cooperative Ethelbert Frey, who rose suddenly and eased the tension by blurting out that "all the attorneys could not be wrong all the time." The next day when Latimer had had time to read his remarks in the record, he moved to have them expunged. Needless to say, the motion was granted.

The authors of this book soon became convinced of the uselessness of making objections in the usual or customary manner. They had not the slightest hope of being able to enlighten the judge or to influence his decision in favor of the defendants. But, by arguing in language the jury could understand, they could help the defense cause. So they urged defense counsel to address the judge for the benefit of the jury in language which a layman could comprehend.

One day defense counsel was explaining his objection to a ruling in such non-technical language, when the judge interrupted with: "Why don't you speak in legal language?" Counsel replied, "Your Honor, I am trying to speak in language that even your Honor can understand."

A great advantage of the defense, as already stated, was that it was always spontaneous, unrehearsed, unplanned, individualistic and human. There was no leader, no co-ordination and no conservative direction. Nevertheless, the entire group of defense lawyers got on together amazingly well and displayed the sort of esprit de corps that one expects from soldiers but not from lawyers, each representing different clients with no common tie of interest or sympathy. The lawyers got on together like the members of a sporting club or a lot of troupers in a traveling circus, each of whom has his own act, and all of whom respect and affectionately regard each other.

This situation was doubtless due in large part to the fact that there was no element of pecuniary motivation to cause jealousy or friction among the defense lawyers. It did not help any lawyer in the case, either with the general public or official Washington in particular, to put up a fight. For the unpaid lawyers, the fight was one of noblesse oblige. It was altrustic. It was sporting. It was in the best southern tradition. It was also peculiarly American. And it was in the most idealistic tradition of the American bar.

There was no fear on the part of any one that another lawyer might hurt his client. If a given lawyer did not like the act a colleague might be putting on, he would step out and take a smoke until there was a new number. There was never any question of any one lawyer stealing the limelight. There was time and limelight for all. No matter what the subject or occasion, every lawyer was entitled to be heard. There was a stage and a turn for each to say his piece. If one lawyer forgot something he wanted said during his turn, he could usually get a colleague to work it in on the latter's time. Getting up and having something to say was a natural and human way of momentarily relieving one's self of the boredom of the Trial.

The defense had the advantage of several times as many voices as the prosecution. And even if each defense lawyer were arbitrarily restricted to one fourth the time the prosecutor took on any particular piece of business, ten to twenty times one fourth, always adds up to more time than the prosecutor had.

The defense had the further advantage of having among professional counsel several active spokesmen whose hearts were peculiarly in their fight. In this connection, the authors will forbear to mention themselves. They do, however, cite the outstanding example of Counsel Dilling, who represented his former wife, from whom he was then separated by divorce. He had, however, long been associated with her in her anti-communist crusading and still shared completely her views and sentiments on the subject. The spectacle of a man gallantly and conscientiously battling for the good name of the mother of his two children, one a splendid young man who first came to the Trial a corporal and later a second lieutenant, and the other a fine young woman going to college, who also appeared frequently in court in the family group, gave a human touch to the Trial which was not calculated to heighten the impression the government sought to create about the defendants.

The Dillings added another human and peculiarly feminine touch to the Trial by bringing daily to the defendants in custody, some nine in number, a lunch from a restaurant across the street. At the beginning of the Trial the attorneys representing these defendants in custody had called the court's attention to malnutrition of their clients due partly to the fact that the principal meal of the day served in jail was missed by them and was replaced by a rather scanty sandwich served to them in the court house. Defendant Jones, representing himself, rose and stated in open court that he was being slowly starved to death during the first few days of the Trial. And, at the time, he looked it. There was a noticeable improvement in the mien and general physical appearance of the defendants in custody a few weeks after the daily supplementary feeding had begun. The court marshals were as human, indulgent and kindly as the regulations would allow, possibly more so.

Several lawyers had their ladies, wives and daughters, as frequent visitors in court and such couples freely mingled with the defendants and their wives and children in and around the court. All this gave the whole proceeding more the atmosphere of a church festival or a college reunion than a criminal trial.

When the defendant Viereck's son was reported in the papers as killed in action, during the Trial, prosecutor Rogge gave his contribution to the human side of the Trial by protesting against a reference to that fact by Viereck's attorney in the latter's opening statement. Still, the jury could not help reading the news item. And it is hard to believe that a man who has put boys through college and given one to the country of his adoption was actively conspiring to cause insubordination in the armed forces.

On the score of the human side of the Trial, it is to be remarked that one of the biggest miscalculations of the prosecution was that its lurid accounts of some of the more extreme examples of anti-Semitic, racist and anti-communist utterances by certain defendants would shock and horrify the jury. In this respect Rogge was doubtless too much a believer in his own line to be entirely objective. Washington is a southern town. The members of an average middle class jury, made up largely of small businessmen and run of the mill white collar folk in a southern town are not likely to be quite as horrified by race prejudice as the readers of *New Masses* and *PM* or Rogge's public. When Rogge expected the jury to register horror they merely snickered.

It is not to be assumed that all the members of the jury shared the prejudices of many of the defendants, at least, to the same extent; but it is to be kept in mind that Washington is a southern town and that the South has a marked lack of intolerance for race prejudice. Any evidence related to the offense charged, namely, that of causing insubordination in the armed forces would unquestionably have provoked revulsion against the defendants on the part of any average southern jury. But the theory that race prejudice, racism or anti-communism are the equivalents of Nazism and the causing of insubordination in the armed forces is one that cannot fail to excite surprise, amusement and, even, disgust, on the part of the average southerner.

To the *New Masses,* for discussing the Trial with whose correspondents Rogge got himself reprimanded by the judge, the prosecution theory was obvious and the evidence terrific. But to the average reader of *The Washington Star* it would only sound corny and provoke a broad yawn. It is not to be lightly assumed, of course, that a jury of average Jews or average Negroes would have fallen for Rogge's prosecution theory. Quite the contrary. It takes a specially conditioned mind to accept unquestioningly the thesis that racism or racial prejudice or anti-Semitism are the equivalents of Nazism or that they equal undermining the loyalty of the armed forces. And it would be hard to find a jury of twelve average, run-of-the-mill, Jews or Negroes, in which there would not be one believer in free speech, fair play or the right to have prejudices.

It was in the realm of human behavior that Rogge and the Department of Justice and, also, the judge, in his selection of attorneys for the defense, made their biggest miscalculations. Just as in the planning and perpetration of the perfect crime it is usually some unforeseen human factor that gives the clue, so, in the Sedition Trial, in which a "perfect" prosecution case and theory had been conceived, it was, in large part, the human factors which brought the government's case to grief.

One touch of nature makes the whole world kin. The government case was as unnatural and as lacking in human appeal as the Marxist dialectic. And it was tried not on a Union Square, Bronx or Brooklyn jury, but on an average southern middle class jury. To win easy convictions, the government should have staged the Trial in the Bronx or on the East Side of Manhattan and packed the jury venire with only readers of *New Masses,* P.M., *The New York Evening Post* or the B'nai B'rith's *Messenger.*

The convictions thus obtained would have been reversed by the Supreme Court on appeal a couple years later, if the defendants had not, in the meantime, been pardoned by a shrewd President and the whole case thus rendered moot. But the victory for the people behind the Trial would have been complete. The defendants would have been made examples of and, even though they would have won on appeal, they would have served a couple of years in jail, since Washington courts do not grant bail on conviction pending appeal. It would have taken at least two years to have got an appeal to the Supreme Court, with a record the size of the one in the Sedition Trial.

Here, once again, the human factor in the Trial played another important part. The average lawyer, taking a purely professional, unsentimental and practical view of the entire problem would have tended, even as counsel retained and paid by a defendant, to have reasoned somewhat as follows: "The government, it is true, has no case. But the defendants have little chance in wartime on a fight against a flag-waving, passion-inflaming prosecution, especially with a 100% New Deal judge and a patriotic jury. The best thing for the defendants to do is to expedite the Trial and have a short record on appeal. Reversal of convictions is fairly certain. Pardons, once the war is over, are indicated. About all a defense lawyer can accomplish or should seriously attempt is to make a proper record for appeal."

But the defense lawyers, having got to know all the defendants, to like and respect some of them and to feel sorry for all of them, took a more human view of the whole business. They reasoned that the case could and should be beaten before the jury; that if it was not, the defendants would have to do a couple of years in the penitentiary before they could get out on appeal; and that they might never get cleared of the conviction, as a presidential pardon might end the case, save the face of the Department of Justice and deny the victims forever the vindication of their good names to which they were entitled. So the defense lawyers, in large part, taking this human and rather unprofessional as well as distinctly unselfish view of the case, pitched in and fought the case as though they were fighting for a cause or a friend instead of merely following the course of least resistance and obvious self-interest. It put the defense on a different plane from that of an ordinary criminal case. The situation was once rather frankly recognized by Rogge's assistant, Joseph W. Burns, who was considerably more human than Rogge. Said Burns, in a free-for-all discussion during a recess as lawyers, defendants and members of the press sat around and mulled over the case: "But how the devil were we to know that the defendants were going to infect all the lawyers with their spirit?" The answer was that one touch of nature makes the whole world kin.

Actually, of course, the defendants had not infected the lawyers. The case had done it. Human nature had done it. The unpaid lawyers, hand-picked by the New Deal judge, had been moved as men, as human beings. They became friends and pals of the defendants. As such they fought for them as a man would fight for a friend. Again and again, as defendant Dennis, conducting his own defense and cross-examination of government witnesses, would take exception to a court ruling, one or more of the unpaid lawyers would rise to join in Dennis' exception and add to the argument he had developed. They would often remark in this connection that they could not stand by and see a man, fighting his cause without a knowledge of the law, denied his constitutional rights without rising to register a protest. It was rather fine. At times it was touching. It belied many unkind things that are often said against the legal profession. It proved, once more, that a man's a man for a' that, that America is still America and that a lawyer's sense of self-interest is secondary to his sense of fair play when the latter is aroused. It made the authors proud of America, proud of the legal profession, proud of the South and a bit ashamed of the Department of Justice.

CHAPTER XVIII.

THE LASSWELL METHOD OF PROPAGANDA ANALYSIS.

The Lasswell method of propaganda analysis was used to convict William Dudley Pelley in 1942 on a charge under the sedition section of the Espionage Act of 1917. Rogge announced before the Sedition Trial started that he planned to use the Lasswell method again as one of the pillars of the prosecution. By the Lasswell method, Pelley's propaganda content was shown to have a high percentage of consistencies and a low percentage of inconsistencies with fourteen themes of Nazi propaganda selected by Lasswell. For a wartime jury, that was enough to convict him.

The Propaganda Analysis Section of the Federal Communications Commission had kept a number of experts busy monitoring German and other Axis propaganda sent by short wave to this country. These experts selected fourteen themes of such propaganda which are listed below. They then analyzed the literature of Pelley and found in it a high percentage of consistency, over eighty per cent, with the Nazi themes, selected with a view to showing such consistency, and a small percentage of inconsistency. Here are the famous fourteen themes exactly as worded by the government experts in the Pelley case:

Theme No. 1.

The United States is internally corrupt. That is to say, there is political and economic injustice, war profiteering, plutocratic exploitation, Communist sedition, Jewish conspiracy and spiritual decay within the United States.

Our Comment:

This is not one theme but several themes. It could be sub-divided almost indefinitely into different themes. All critics of things as they are in the United States would inevitably show more consistencies than inconsistencies with these themes. No critic could fail to use some of these themes. No political campaign for a change of a major character, including a change of national administrations, could fail to show more consistencies than inconsistencies with this theme, or, rather, collection of themes. Presumably, any one who said anything that fitted any one of this group of themes would be following Lasswell's Nazi propaganda theme No. 1.

Theme No. 2.

The foreign policies of the United States are morally unjustifiable. That is to say, they are selfish, bullying, imperialistic, hypocritical and predatory.

Our Comment:

Here again are many themes, not just one. Under this heading could be fitted practically every criticism of American foreign policy. For any one who demands a change in American foreign policy is almost sure to base his demand on the contention that the policy is morally unjustifiable.

Theme No. 3.

The President of the United States is reprehensible. That is to say, he is a warmonger and a liar, unscrupulous, responsible for suffering, and a pawn of the Jews, Communists or Plutocrats.

Our Comment:

This, again, is not one theme, but several themes. Critics of the President and his war policy before Pearl Harbor all said some of the things covered in this theme.

Theme 4.

Great Britain is internally corrupt. That is, there is political and economic injustice, war profiteering, plutocratic exploitation, Communist sedition, Jewish conspiracy, and spiritual decay within Great Britain.

Our Comment:

Again, not one theme but several themes. The British Labour Party, which swept the country in the elections of July, 1945, said that there was political and economic injustice, war profiteering, plutocratic exploitation and spiritual decay within Great Britain. Thus they used four out of six elements of this theme, or two-thirds of it, the only parts they did not use being those about

Communist sedition and Jewish conspiracy. Most of the conservatives, and liberals, as well as radical churchmen and high ecclesiastics of the Established Church of England, would have said and have said repeatedly that there was spiritual decay in England. Preachers have been saying that about their own countries everywhere since time immemorial.

Theme No. 5.

The foreign policies of Great Britain are morally unjustifiable. That is to say, they are selfish, bullying, imperialistic, hypocritical and predatory.

Our Comment:

The British Labour Party has said this for decades.

Theme No. 6.

Prime Minister Churchill is reprehensible. That is to say he is a war-monger and a liar, unscrupulous, responsible for suffering, and a pawn of the Jews, Communists or Plutocrats.

Our Comment:

The British Labour Party leaders and writers have said that Churchill was reprehensible. The result of the election of 1945 was hardly a verdict of confidence in or satisfaction with Churchill. There could be no political opposition if it were a crime to say that a political leader is reprehensible or to say things that make him appear to be reprehensible.

Theme No. 7.

Nazi Germany is just and virtuous. That is, its aims are justifiable, and noble; it is truthful, considerate and benevolent.

Our Comment:

The two themes describing defense of Germany and Japan, respectively, are about the only two of the fourteen which do not occur in some form in most opposition propaganda in America and Britain. Even these two themes defending Germany and Japan can be found in different forms in much propaganda from highly reputable sources before Pearl Harbor. It was perfectly lawful and permissible to say such things before Pearl Harbor. As we show in Chapter XVI, Winston Churchill said in 1938 that he hoped that if Great Britain were ever defeated in war the British would "find a Hitler to lead us back to our rightful place among the nations."

It is well to note that a person who omitted the two themes about Germany and Japan being just, but who used the other twelve themes, in some form, would have a score of peddling eighty-five per cent Nazi propaganda according to the Lasswell system.

Theme No. 8.

The foreign policies of Japan are morally justifiable. That is to say, Japan has been patient, long suffering; it is not responsible for the war.

Our Comment:

Our Comment under Theme 7 applies here, plus the observation that for over twenty-five years before the beginning of the present war the British Empire had been most of the time either an official ally or a close collaborator with the Japanese, and that the House of Morgan in New York had floated hundreds of millions of dollars of Japanese loans. Surely during that period, neither the British nor the House of Morgan and its clients thought that the foreign policies of Japan were morally unjustifiable.

Theme No. 9.

Nazi Germany is powerful. That is to say, it possesses the manpower, armaments, materials, and morale essential for victory.

Theme No. 10.

Japan is powerful. That is to say, it possesses the manpower, armaments, materials, and morale essential for victory.

Our Comment on Themes 9 and 10:

What informed person would not have said both 9 and 10 at any time before we entered the war? Note that the theme is not that Germany or Japan was sure to win but that each had the military requisites for winning. Who did not say that or approximately that? As a matter of fact, substantially the self-same thing is being said now of both Germany and Japan in the hour of total defeat and occupation. It is being said as a reason for the indefinite occupation and military control of both countries. "Nazi Germany is powerful." "Japan is powerful." What sane and informed person could have said the contrary at any time over the past fifty or more years?

Theme No. 11.

The United States is weak. That is to say, it lacks the materials, manpower, armaments and morale essential for victory.

Our Comment:

Here, again, it is to be noted that there are several themes, not just one. The theme is not that the United States could not posibly win a war. The theme obviously is that the United States was not prepared for war or that it was in a weak position for starting or entering a war. Well, most people said about that in this connection. If war between the United States and Russia were now or in the near future to be discussed, a great many people would say that the United States was in a weak position for undertaking such a war. That would be an obvious argument or statement to make against a policy leading to war with Russia. It would not amount to saying that the United States could not win such a war or that the person who made this statement was disloyal or a defeatist in the event of such a conflict, to which, however, he might have been bitterly opposed before it started.

Theme No. 12.

Great Britain is weak. That is to say, the British Empire is collapsing; and it lacks the necessary materials, manpower, armaments and morale.

Comment:

The same general observations made under Theme 11 apply here, plus the added comment that all sorts of people, including a majority of the members and leaders of the now triumphant British Labour Party have long been saying that the British Empire is collapsing. As a matter of fact, at the time of writing this book, in the hour of total victory of the Allied Nations, of which

Britain is one of the three senior partners, it is hard to find a piece of discussion of the current situation in which there is not some reference to the fact that "Great Britain is weak."

Theme No. 13.
The United Nations are disunited. That is to say, they distrust, deceive, envy, and suspect each other.

Our Comment:
This, again, is not one but many themes. Almost every commentator on the subject has at some time and in some way said that the United Nations are disunited. Hardly a lengthy report or article on the general subjects involved fails to contain some statement or suggestion that they are disunited.

Theme No. 14.
The United States and the world are menaced by Communists, Jews, Plutocrats.

Our Comment:
This theme is downright dishonest and crooked as an intellectual formulation since it links three utterly distinct and different propositions under one head. According to the reasoning the government was suggesting to the jury by this theme, any person who said that the United States was menaced by Communists, or by Jews or by plutocrats would be propagating this theme. Thus all socialists who say the United States is menaced by plutocrats, all conservatives who say the United States is menaced by Communists (and this would include many socialists like Norman Thomas who also say the United States is menaced by Communists) and all anti-Semites who say the United States is menaced by Jews are lumped together and could be shown to propagate Theme No. 14. It is both dishonest and absurd. Such is the Lasswell method in use by the Department of Justice.

The bright lads of the Department of Justice, imbued with the doctrine that law enforcement should be a tool of policy to get whatever result may be desired and please whatever group for the votes of which the Administration may wish to make a bid, had no difficulty in showing that Pelley's propaganda, for which the authors of this book hold no brief and with which they do not in any way agree, was Nazi propaganda because it could be shown by comparison with the above fourteen themes to be over eighty per cent similar to Nazi propaganda. Well, what is wrong with the Lasswell method as a method?

The Lasswell method of listing characteristics common to several batches of propaganda or of listing the characteristics of anything for that matter is perfectly obvious and proper technique for use by scholars and research workers in serving certain ends, such as analysis, description, classification, differentiation, comparison and prediction. But such a method must be used properly, which is to say, scientifically and rationally. There is nothing wrong with listing fourteen or fourteen hundred characteristics which two or more groups of things or persons may have in common. But there is everything wrong with doing the following:

1. Take two or more things or two or more groups of things;
2. Select fourteen characteristics which all these things have in common;
3. Infer from this matching of selected characteristics that the two things or groups are alike or similar.

Obviously, the fourteen characteristics selected are not all the characteristics of the two things or sets of things being compared. On the contrary, they are just a few of them. Or, to look at the matter in another way, it is easy in the cases of almost any two or more things, persons, religions, political or other doctrines or theories, to pick out fourteen similarities or fourteen characteristics they all have in common. One can pick out fourteen characteristics a man and a tree or a man and a fish have in common. To offer such a selection of similarities as proof that a man is a tree or a fish or substantially the same thing, would be ridiculous. Yet that is about what the government did with the Lasswell method of propaganda analysis in the Pelley case.

If the use of a method like Lasswell's for comparing propaganda is to be scientific and rational, the user must first pose and answer with rationality and truthfulness questions like these: What is the purpose of or what is to be proved or explained by the given listing of common characteristics? If the purpose is to classify, differentiate and predict on the basis of a given set of similarities, it must be shown just how and why the proof of the given similarities will permit or justify such classification, differentiation and prediction. Without such justification, any listing of similarities is sure to be meaningless or deceptive, for the general reasons we shall explain in this chapter.

It is easy to confuse and mislead a jury or anyone not trained in the disciplines of the social sciences and dialectical arts by use of a method of this sort. If one wants to prove a similarity between two batches of propaganda or two groups of things, one merely selects a number of characteristics which are common to both sets of propaganda or both groups of things. If one wants to prove dissimilarity between the same things, one selects with equal facility a number of characteristics which are peculiar to each and not common to both.

In the case of the Lasswell method the first question that would occur to a critical or scientific mind would be: "Why fourteen points? Why not fifty or a hundred themes?" The answer might be that the fourteen themes were selected to furnish a pseudo-scientific basis for giving the impression of similarity between two batches of propaganda. If the fourteen themes were selected with a view to proving similarity, when it would have been just as easy to select themes that would show dissimilarity, the selection and the use of this method cannot be called scientific but the purest charlatanry. In another trial, the government experts used eleven instead of fourteen themes in analyzing the same Nazi propaganda. Any social scientist or almost any informed person could easily divide Lasswell's fourteen themes into twenty-four or forty-eight themes without in any way adding to or changing the content of the fourteen themes. But such additions would result in different impressions on comparison.

To illustrate the point, let us suppose that a group of scientists set out to list all the physical characteristics of white people and Negroes. Such a list, if complete, might run into hundreds or thousands of separate characteristics, all purely physical, that whites and blacks have in common. The members of both races have eyes, ears, arms, noses and so on, ad infinitum. Thus a long list of characteristics common to both racial groups would in no way serve the scientific purposes of classification, differentiation or prediction for the obvious reasons that both whites and blacks have all these physical characteristics and so have the yellow races. Such a listing of common characteristics might serve to validate a classification of all whites and all blacks as members of the human race, but the yellow races are also members of the human race.

Now there are just a few physical characteristics of whites which are not found in Negroes and a few physical characteristics of Negroes which whites do not have, such as pigmentation of skin, texture of the hair, thickness of the lips. Listing only these three physical characteristics would suffice to furnish a basis for classification and differentiation between whites and blacks. But one hardly needs the Lasswell method of listing a number of physical characteristics peculiar to white and peculiar to blacks to be able to tell a white man from a black man. A glance suffices for this differentiation.

But if one wants to classify a person with ten per cent of Negro ancestry or a colored person with ten per cent of white ancestry, the Lasswell method of listing similarities will be found utterly useless. The Lasswell method would not enable one to tell whether a swarthy person was British, Russian, Irish, Italian or ninety per cent Swedish and ten per cent Negro. In such cases, the only way to determine the percentage is to trace the individual's family tree or ancestry for several generations back. Similarly, in the case of propaganda of mixed ancestry and characteristics, there is the same impossibility of determining ancestral components by means of analyzing characteristics.

Just as there is no chemical test by which blood can be graded and classified as to race, so there is no qualitative analysis by which propaganda can be tested or graded according to such classifications as Nazi, socialist, communist, democratic and so forth. One can see that a black man is a Negro or that propaganda put out by the Nazis and bearing their official mark is Nazi propaganda. But neither type of proof requires use of a Lasswell method of listing theme content or physical characteristics. A glance will do in either case. The hallmark is unmistakable.

Let us take one more illustration. Suppose it were desired to prove that the Roman Catholic, the Methodist and the Mohammendan religions are similar by showing that all three have the following fourteen (why fourteen? It's Lasswell's magic number) themes in common:

1. There is only one God.
2. He should be addressed in prayer.
3. There should be places of worship.
4. There is a Heaven.
5. There is a Hell.
6. The soul is immortal.
7. Virtue is rewarded.
8. Vice is punished.
9. Believers in the true faith should try to make converts.
10. Married people should be faithful to each other.
11. All believers are brothers.
12. Human life is sacred.
13. Property rights are to be respected.
14. Bearing false testimony is a crime.

And here we stop, but only because we have completed Lasswell's magic number of fourteen. Obviously, the differences between Roman Catholicism, Methodism and Mohammedanism are many and great. But if one wants to list only similarities, one can easily do so. It would be valid to show that Roman Catholicism is more like Methodism than Mohammedanism, or that both of these forms of Christianity are more like Mohammedanism than many types of religion practiced by certain peoples. Comparison is all right if the purposes are honestly stated and the limitations are frankly recognized. But comparisons can be used to prove the absurd and ridiculous.

To prove that any piece of propaganda is Nazi propaganda by listing its Nazi characteristics, one does not need fourteen characteristics any more than one needs fourteen physical characteristics to differentiate whites from Negroes. Three characteristics will suffice in the case of Negroes: color of skin, texture of hair and thickness of lips. One or two characteristics would suffice to differentiate a Roman Catholic from a Methodist. To list characteristics common to both blacks and whites or to both Catholics and Methodists is not to furnish a basis either of classification or differentiation.

The following three themes or characteristics would amply differentiate and classify Nazi propaganda. For that reason, no doubt, Lasswell left them entirely out of his list, though they did occur regularly in Nazi propaganda, including the broadcasts from Germany from which he and his assistants compiled their specially selected fourteen themes:

Theme 1. The Folk or race and blood idea that the German people are a master race, *Herrenrasse,* destined to rule over other peoples. This is the blood and soil concept. It is also one of the root ideas of traditional Pan-Germanism. Pelley, not being German and not appealing to a German folk, did not use this theme.

Theme 2. The *Lebensraum* or living space idea, according to which Germany needs territory for colonization and development. Pelley naturally did not have any use for this theme in propaganda aimed at Americans.

Theme 3. The *Drang nach Osten* idea or drive towards the east idea, according to which Germany had to expand in the area of Western Russia and the Balkans. It was pursuant to this idea that Hitler attacked Russia in July, 1941. Pelley, of course, had no drive to the East, South, North or West theme in his propaganda for Americans.

The three themes just listed are peculiarly Nazi. They are the quintessence of Nazism. They are not included in Lasswell's list of themes though they appear in all Nazi propaganda. Why did Lasswell not include these peculiarly Nazi themes in his list? The answer, presumably is that these themes did not occur in Pelley's propaganda, and that it was the purpose to select only such Nazi-used themes as Pelley also used. With a view to Pelley's conviction, the Lasswell themes would seem to have been selected to show a similarity between Pelley's line and the Nazi line. We ask the reader whether such use of methodology is science or charlatanry; whether it is fair play or persecution.

It is to be noted in this connection that the four themes listed in the text of the indictment of major war criminals as released by the War Department on October 18, 1945 as the "Doctrinal techniques of the common plan or conspiracy'' charged against the twenty-four Nazis to be put on trial, do not, any one of them, correspond to any one of Lasswell's fourteen themes of Nazi propaganda listed above. We reproduce from the war crimes indictment of the twenty-four Nazis the four themes therein listed:

''(C) Doctrinal techniques of the common plan or conspiracy.

To incite others to join in the common plan or conspiracy, and as a means of securing for the Nazi conspirators the highest degree of control over the German community, they put forth, disseminated, and exploited certain doctrines, among others, as follows:

(1) That persons of so-called ''German blood'' (as specified by the Nazi conspirators) were a ''master race'' and were accordingly entitled to subjugate, dominate or exterminate other ''races'' and peoples.

(2) That the German people should be ruled under the *Fuehrerprinzip* (leadership principle) according to which power was to reside in a Fuehrer from whom sub-leaders were to derive authority in a hierarchical order, each sub-leader to owe unconditional obedience to his immediate superior but to be absolute in his own sphere of jurisdiction; and the power of leadership was to be unlimited, extending to all phases of public and private life.

(3) That war was a noble and necessary activity of Germans.

(4) That the leadership of the Nazi party, as the sole bearer of the foregoing and other doctrines of the Nazi party, was entitled to shape the structure, policies and practices of the German State and all related institutions, to direct and supervise the activities of all individuals within the State and to destroy all opponents.''

The government used the Lasswell method against Pelley to convey to the jury the idea that he was getting his propaganda themes from the Nazi short wave, and hence that he was using these themes with a Nazi intent to defeat the American war effort. Actually, of course, what, in general, had happened was the exact reverse. The Nazis, preparing their short wave propaganda transmissions to America, in opposition to President Roosevelt's war and interventionist policies, had naturally chosen in largest part those propaganda themes that had been used all along by native isolationist groups whose members for their own and for peculiarly native reasons had opposed President Roosevelt's war policies, the Jews and the communists. It would have been closer to the truth to say that the Nazi short wave propaganda to this country was following the Pelley line than that Pelley was following the Nazi line.

It will always transpire in any international war of words waged over the air and through the press that any foreign nation or interest seeking to influence American public opinion will use mainly propaganda themes that have already been long and widely used by native American propagandists in furtherance of causes of their own, purely indigenous in character. Thus, if America moved towards war with Russia and finally got into war with Russia, Russian short wave propaganda to this country, both while America was getting into that war and after it had got in, would consist mainly of the isolationist ideas of native Americans, from George Washington's Farewell Address down to date, and not mainly of peculiarly Russian or communist ideas. It would be easy to pick fourteen themes of such Russian propaganda which would be common to most native isolationist propagandists.

What the government tried to do in the way of proving that Pelley's propaganda was Nazi propaganda was exactly like trying to prove that a white man was a black man or that a Roman Catholic was a Methodist by showing that all whites and blacks or all Catholics and Methodists have fourteen characteristics in common. Lasswell's propaganda themes, as used to compare Pelley and the Nazis, proved only that both were critics of many of the same things and people. The fact that there were similarities between Pelley's propaganda and Nazi propaganda did not link Pelley in criminal intent with the Nazis.

We state a proposition as indisputable as the fact that all men of whatsoever race or color are members of the human race when we say that all critics of the same things will tend to say the same or closely similar things. Americans and Nazis criticizing the late President Roosevelt, his administration, his foreign policy or any thing else cannot help saying the same, or nearly the same, things in making such criticism. This similarity in no way proves unity, agreement, conspiracy, confederation and sameness of motive or intent. That is the whole point of this entire chapter.

To show that a man is a Negro three common characteristics of all Negroes will suffice. To show he is a Catholic one or two will suffice. To show additional characteristics of all whites and Negroes, or of all Catholics and Methodists, will serve no useful purpose in this connection. To prove a man is a Nazi or that his propaganda is Nazi, it would be necessary only to show two or three things. To show wherein he or his propaganda has similarities to the Nazis and their propaganda is pointless if such similarities characterize all sorts of other people and propaganda, not Nazi.

But a jury cannot be expected, especially in wartime, to reason thus correctly about a wholly new type of expert testimony such as that of Lasswell and his propaganda analysis when both the trial judge and the defense lawyers fail to make plain to the jury the explanations and analysis somewhat tediously developed in this chapter. Without such explanations, a jury will naturally conclude that the expert has analyzed the American defendant's propaganda and competently certified it as being Nazi and hence criminal propaganda made with intent to violate the law under which the defendant stands accused.

It takes a lot of argument and enlightenment to put across the idea that the day a government expert can brand political utterances criminal or Nazi or anything else by means of so-called analysis of what is said and the day that brand can suffice to sustain a criminal conviction in an American court, America is well on the road to the same regime Soviet Russia has or Nazi Germany had. It is easy to popularize the notion that experts can brand propaganda in the same way experts can analyze and brand food and drugs for the purposes of the Pure Food and Drugs Act. But that notion is incompatible with everything that is basic to our liberties.

According to the American theory, the people alone have the right to judge propaganda. It was the province of the jury to decide whether Pelley's propaganda showed intent to violate the law under which he was standing trial. It was not the province of a government expert to tell the jury what was the character of Pelley's propaganda or that it was similar to Nazi propaganda. As the late Supreme Court Justice Holmes said in his famous dissenting opinion in the Abrams case (Abrams v. U.S. 250 U.S. 616) in which Justice Brandeis also concurred:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes can be safely carried out. That at any rate is the theory of our Constitution.

Here we digress to comment that the doctrine of Holmes and Brandeis is not the theory of Lasswell, Biddle, the Department of Justice under Biddle or the Soviet regime. Having taken note of the American theory just quoted from Holmes and Brandeis, let us take up the theory on this point of Moscow, Biddle, the Department of Justice and the Sedition Trial as set down by Lasswell himself in a brilliant though highly theoretical text of his entitled *Psychopathology and Politics.*

Lasswell is a Freudian who believes that public opinion should be manipulated by government experts in the interests of harmony and progress as the government sees fit. We will quote from Lasswell's *Psychopathology and Politics,* a book published by The University of Chicago Press in 1934. This is Lasswell's chief work which reveals his political philosophy and that of the New Dealers who brought him to Washington as an expert on public opinion manipulation and installed him in the Library of Congress. We only regret that we cannot quote most of this book, for it is the best give-away of the totalitarian and anti-libertarian trend of the New Deal to be found anywhere in print. We quote from Lasswell's Chapter 10 entitled, *The Politics of Prevention.* A reading of this chapter quickly reveals that what Lasswell wants prevented is free speech.

> The premise of Democracy is that each man is the best judge of his own interest, and that all whose interests are affected should be consulted in the determination of policy. Thus the procedure of a democratic society is to clear the way to the presentation of various demands by interested parties, leaving the coast clear for

> bargain and compromise, or for creative invention and integration.
>
> The findings of personality research show that the individual is a poor judge of his own interest (page 194).

And so Lasswell parts company with our theory of government and comes out for the manipulation or guidance as he would call it of public opinion by experts like himself who will think things out for the people and tell them what ideas are true and false and good or bad for them, which, obviously, will be those ideas that the bosses of the bureaucrats like Lasswell deem good for the people. Lasswell gives it all away in the following passage on page 196:

> The time has come to abandon the assumption that the problem of politics is the problem of promoting discussion among all the interests concerned in a given problem.

Here Lasswell says, in effect, that the time has come to abandon the American way. It is not strange that he had a post in the Library of Congress and was a star witness for the government in its free speech trials. Lasswell continues on page 196:

> Discussion frequently complicates social difficulties, for the discussion by far-flung interests arouses a psychology of conflict which produces obstructive, fictitious, and irrelevant values. The problem of politics is less to solve conflicts than to prevent them; less to serve as a safety valve for social protest than to apply social energy to the abolition of recurrent sources of strain in society.
>
> This redefinition of the problem of politics may be called the idea of preventive politics. The politics of prevention draws attention squarely to the central problem of reducing the level of strain and maladaptation in society. In some measures it will proceed by encouraging discussion among all those who are affected by social policy, but this will be no ironclad rule.

In other words, Lasswell will have no more nonsense about freedom of speech and the press. He continues:

> In some measure it will proceed by improving the machinery of settling disputes, but this will be subordinated to a comprehensive program, and no longer treated as an especially desirable mode of handling the situation.

> The recognition that people are poor judges of their own interest is often supposed to lead to the conclusion that a dictator is essential. But no student of individual psychology can fail to share the conviction of Kempf that "Society is not safe . . . when it is forced to follow the dictations of one individual, of one autonomic apparatus, no matter how splendidly and altruistically it may be conditioned." Our thinking has too long been misled by the threadbare terminology of democracy versus dictatorship, of democracy versus aristocracy. Our problem is to be ruled by the truth about the conditions of harmonious human relations, and the discovery of the truth is an object of specialized research; it is no monopoly of people as people, or of the ruler as ruler. As our devices of accurate ascertainment are invented and spread they are explained and applied by many individuals inside the social order.

It is clear from the above that Lasswell's political theory calls for government by a selected group of experts who will ascertain the truth for the people and appropriately reveal it to them, resolving for the people all major conflicts and thus avoiding many of the clashes that characterize the working of our system of government. He says that this ideal is not that of a one man dictatorship. He may be right. But the Russian communists can say exactly the same of their ideal. The Politburo composed of less than a score of brain trusters is the sort of thing Lasswell apparently wants. It is in this way the Russian people are ruled by truth as Politburo experts ascertain and lay it down for them and not as they are allowed by the Russian state to discover it for themselves in the open market of ideas. The Sedition Trial and the Pelley trial in which Lasswell's expert testimony sent a man to the penitentiary for fifteen years for a crime of utterance are examples of the putting into practice of Lasswell's "politics of prevention." The implications of Lasswell's political philosophy were neither understood nor expounded by the defense in Pelley's trial. These implications call for considerable explanation to complete the record on Biddle's wartime witch hunts.

Pelley was Lasswell's first guinea pig. He made a good subject for experiment as he had said and written a great many things most people would not care to defend. In wartime there are few people with moral courage or political wisdom enough to say with Voltaire, "I hate everything you say but I'll die for your right to say it." That is the attitude of the authors of this book with respect to much that many of the defendants said or wrote and to much that other victims of the Department of Justice's wartime witch hunts said and wrote.

Pelley's lawyers, both in his 1942 trial under the Espionage Act and on appeal, failed appropriately and adequately to challenge the government's use in that case of the Lasswell method. Pelley's lawyers apparently chose, in the language of his lawyer in the Sedition Trial, to fight the case on the law. Where they did clash with the government on the evidence, they did so largely on the issue of the truth or falsity of the things Pelley wrote or said. Now in a trial under the Espionage Act of 1917 truth might be a good defense if it could ever be proved up to the hilt in respect of an indicted utterance of the accused. Spreading false statements with intent to hinder the war effort is one of the crimes under the Espionage Act and one of the charges against Pelley in his 1942 trial. But what person writing and talking with passion a lot about controversial political and social questions can ever prove the truth or factual exactitude of every statement he makes? A large part of such utterances consists of opinion and interpretation, the truth of which is hardly susceptible of proof. Thus, Pelley had said among other rash things a great deal about the United States being or going bankrupt. Obviously, statements of that sort do not admit of either proof or disproof. They are true or false according to the premises by which judged. And there are no absolute standards by which to judge such propositions.

Pelley's lawyers appealed and lost in the Court of Appeals and were denied review by the Supreme Court. They never made a proper challenge of the Lasswell method as used against Pelley and as used to convict a number of German defendants in a trial in Newark a couple of years later, the defense there failing also to make a proper attack on the Lasswell method. Pelley's defense failed to base its case four-square on the twin pillars of no proof of intent and no proof of clear and present danger. These criteria of sufficient proof of intent to violate the law by the use of words and sufficient proof of creating by words a clear and present danger of causing the evils Congress has a right to prevent have recently had the clearest and most emphatic restatement by the Supreme Court in reversing the judgments of the trial and Appellate Courts in the civil liberties cases of Hartzel and Baumgartner. The necessity to prove beyond a reasonable doubt intent and clear and present danger is now a part of the law of the land governing all free speech cases. This is the legal angle or line of attack on the use of the Lasswell method. It has to go hand in hand with an accurate analysis of the Lasswell expert testimony and methods of "evidence."

In civil liberties cases involving the principle of free speech, the only real issues now are the essentially factual issues of intent and clear and present danger. In a free speech case, there is usually little to argue about as to the law or, in the way of evidence, as to what the accused said, wrote or did. The evidence that the defendant said, wrote and did the things charged is usually incontrovertible. The only pertinent question is, Did he say, write or do them with intent ("wilfully") to cause insubordination in the army? Or to overthrow the government by violence? Or to obstruct the war effort? And did he say, write or do these things in a way to create a clear and present danger? It is along this line of legal and evidential attack that the Lasswell method, as used against Pelley and as Rogge said in the preliminary hearings he proposed to use it in the Sedition case, can be successfully discredited.

Fortunately, in this land of ours, free-speech cases are extremely rare. They occur in significant number only in wartime. Even then, they are but an infinitesimal fraction of all criminal cases. Consequently, the average lawyer, and even the attorney of exceptional experience and ability in criminal trial practice, never has had any experience, training or reading whatsoever in the free speech field. He is as unqualified to conduct a defense in that field as he would be to practice in Admiralty, international law, patent law or under the Napoleonic Code rules. He is apt to bring to a free speech case only his knowledge of and experience in criminal law and to plan and conduct a defense largely in ignorance and disregard of the long line of free speech cases and court rulings, particularly of the Supreme Court, in recent cases of this character.

The key to the attack on the use of the Lasswell method to convict Pelley is this: (1) The government must prove intent; (2) similarity of content is not similarity of intent. Pelley's defense missed it. Lasswell's method proved the similarity in content of Pelley's propaganda and Nazi propaganda. It did not prove a similarity in criminal intent. The jury was asked and allowed to infer that. If the defense had been appropriately argued, the jury would have had to be instructed that such an inference was not permissible for them to draw since an inference of innocence of Nazi intent or criminal intent was equally compatible with this circumstantial evidence.

As we have already pointed out in other connections, the killing of a man in identically the same way or with identically the same instrumentality, say a rifle, may be murder, manslaughter, justifiable homicide, legal execution or a glorious act of military heroism. What gives the act either a criminal or a lawful character is not the nature of the instrument used or the nature of the act committed. It is solely the intent with which the act was performed. Imagine the absurdity of a prosecutor in a murder case calling on an expert like Lasswell to list fourteen characteristics of the rifle with which the killing was done and to show that eighty-five per cent of these characteristics were found by the same expert in the rifles with which several convicted murderers had committed murder. Similarity of content of two pieces of propaganda is no more similarity of intent than similarity of instruments with which two killings are done is proof of similarity of intent in both killings. The content of propaganda is undoubtedly relevant to proof of intent, just as the nature of the instrument with which a man strikes another is relevant to proof of intent in striking him. But a similarity in content of two pieces of propaganda, one of which is admittedly criminal in intent, is no more proof of criminal intent than the similarity in the nature of two weapons used in killing is proof that if one weapon was used to commit murder the other was also used to commit murder. The question as to the content of a batch of indicted propaganda is not whether the propaganda is Nazi-like or Nazi in character but whether it shows intent to cause some evil Congress has a right to prevent and whether the dissemination of this propaganda creates a clear and present danger of causing this evil. The fact that Pelley's propaganda was like that of the Nazis was utterly irrelevant to the proof of criminal intent or clear and present danger.

Professor Lasswell could easily have been made to testify on cross examination by Pelley's counsel that his method of propaganda analysis was only designed to show similarity of content of different batches of propaganda prose. He would have had to admit that his method did not serve to show anything whatsoever about similarity of intent. He would have had to admit that two propagandists can say the same thing with different intents. Of course, had the defense brought this out, the government prosecutor would, no doubt, have argued that Lasswell's propaganda analysis was offered in evidence only to show that the defendant Pelley's propaganda was like that of the Nazis, and that it was for the jury to draw its own conclusions as to intent from such showing. To this a proper defense would have instantly replied: "Because of what the prosecution has just said we demand as a constitutional right a directed verdict. The similarity in content shown is equally compatible with a hypothesis of innocence of Nazi intent as with a hypothesis of guilt of Nazi intent. Therefore, the jury must be directed to acquit. It has no right to draw a conclusion of guilt when a conclusion of innocence is equally compatible with the evidence. Professor Lasswell does not and cannot testify that his analysis shows that no one could use what he finds to be Nazi themes without being a Nazi or without having a Nazi intent to obstruct the war effort and cause insubordination."

A fair judge, it would seem, would, in accordance with the rules of evidence, have had to sustain a defense objection to the admission of the Lasswell similarity-of-content evidence on the argued grounds that such evidence was irrelevant since it could serve to prove exclusively neither criminal intent nor clear and present danger. It is fairly certain that no defense lawyer would have failed to challenge evidence in a murder case that the gun with which the killing was done was the same sort of gun with which a convicted murderer had committed a murder in the past. And it is equally certain that no judge would have admitted this sort of evidence in a murder case. Well, as the Supreme Court once said in a free-speech case, "words are the triggers of action." But the fact that two triggers are alike does not prove that two persons pulling these same triggers at different times and places and under different circumstances did so with the same intent or aim.

The law and the logic in murder cases are matters of common knowledge to, and understanding by, all lawyers whereas the law and logic in free speech cases are a great mystery to most lawyers as well as to many judges in the lower courts as recent Supreme Court reversals conclusively prove. The reason probably is that there are more murder and felony trials than free speech trials. So when the government pulled the Lasswell method on Pelley, it was pulling a fast one. It was pulling a surprise. It was trying something new and different in the way of proof.

Here it is not amiss to interpose for the benefit of defense lawyers in future free speech cases certain observations which are the fruits of experience as well as of extensive reading, study and courtroom argument. An expert witness is normally a witness any experienced lawyer greatly fears. The reasons are obvious. The expert knows his subject; the lawyer cross-examining him does not. Consequently the lawyer who tries to impeach or discredit an expert testifying in his field, which is not that of the cross-examining lawyer, is apt to get himself and his client's case discredited rather than the expert witness. This is why a lawyer usually shies away from locking horns with an expert witness unless the lawyer has the advice and assistance of his own expert in the same field. Ordinarily, in a case in which it is expected that an expert, like a medical man, will testify for one side, the other side retains another expert of the same species to assist on its side. In the Pelley case, the defense needed and lacked an expert in Lasswell's field.

CHAPTER XIX.

BEATING AN IMPROPER PROSECUTION.

What we have to say in this chapter, following our expose in the preceding chapter of the misuse of the Lasswell method, is of general interest in connection not only with the Sedition Trial and other prosecutions of like character against unpopular or persecuted minorities, but also with regard to a growing number of criminal prosecutions brought by the United States Department of Justice against large corporations on complex conspiracy charges, usually involving some alleged violation of the Sherman Anti-Trust and Anti-Monopoly Act. The basic ideas in the political prosecutions are the overthrow of the government by force and the causing of insubordination in the armed forces. In the big business cases, the big idea is restraint of trade. There is nothing wrong with such laws. But there can be a lot wrong with their use for political purposes. They lend themselves to such use or, rather, abuse.

Adam Smith wrote in his WEALTH OF NATIONS nearly two hundred years ago something that is no less true today than then. He said (Vol. 1. Page 117. Everyman's Library Edition): "People of the same trade seldom meet together, even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary." Well, the Department of Justice has lately been conducted by legal theorists who think that they can stop what Adam Smith said people in the same trade do all the time and what they can't be prevented by law from doing.

Thus, the government selects a large chain store and collects a mass of evidence which takes a year of trial to present to a jury to prove the chain guilty of conspiracy in restraint of trade. The government's case is essentially a historical thesis, just as in the Washington Sedition Trial. The big idea is to select thousands of acts, transactions and utterances involving the chain store and weave them into a pattern from which a jury can be asked to infer the guilt of the accused of the particular monopoly conspiracy charged. In any case of this character, including one like the Sedition Trial, the government's evidence is sure to be, with few and minor exceptions, wholly incontestable. The question is: Does the pattern prove the charge? The answer is: Yes and no. The pattern of evidence taken by itself does prove the charge. If, however, one considers that the pattern is not a complete statement of all the facts or that another pattern of facts suggesting the opposite conclusion could be made up, one must find that the government's pattern of facts does not prove the charge. Whether the evidence proves the charge, then, is not an issue of fact, but one of what are proper assumptions about the case. Thus, it is no case for a court or a jury.

Here it might be argued that a defense pattern suggesting that the chain store was merely trying to carry on in a usual and legitimate way would not rebut the presumption of guilt of monopolistic conspiracy raised by the government's selected pattern of facts. But the ruling principle here is that wherever the circumstantial evidence is consistent with innocence as well as guilt, an acquittal must be directed. An easy error to fall into in cases where it is attempted to prove guilt by showing a vast historical thesis is that of comparing such proof to the circumstantial evidence case presented in a proper felony case to prove that a person committed a single criminal act.

What the government does in a prosecution—like that of the chain store, or the Sedition Trial—in which a year is required to put in the evidence, is to select a pattern of facts suggesting a conclusion of guilt of the charge, and then to ask a jury to infer that this pattern is fairly representative of the company's entire operations. The trouble with such a pattern is that it is not fairly representative of the business operations of the accused company as a whole. Offering such a pattern of facts to prove monopoly is like offering a selected pattern of acts in a man's life to prove that he is a loafer instead of a worker, or that he is mean instead of generous. The best worker may and usually does have his periods of loafing or relaxation. The most generous person has his moments of ungenerosity. It is never logical to try to characterize any one's behavior by a selected pattern of acts, which have been picked to support a given characterization. To decide whether a man should be classed a loafer or a worker, it would be necessary to have a complete record of his life over a prolonged period, and to give due weight to all the facts about his loafing and his working. To decide whether a corporation is guilty of conspiracy to restrain trade, it would seem necessary to consider a complete record of its operations and give due weight to all the facts. And that is practically impossible for any jury ever to do. There are just too many facts.

If the crime of monopoly could be proved by the commission of one or several acts, then the jury could competently decide the question whether those acts had been committed. But where it is attempted to prove the crime of monopoly solely by inference from a vast record of perfectly lawful and normal operations selected for this purpose, it is our contention that it cannot be satisfactorily proved at all, for the simple reasons that the record is not complete and that no jury can ever digest all the necessary facts and weigh them with a view to reaching a conclusion. If the jury infers guilt from a specially selected pattern of facts, the inference is not a justifiable one because the pattern of facts is not a complete record.

The fatal defects of any verdict of guilt of a crime like conspiracy, based on conclusions drawn from a vast historical thesis composed of only facts selected to prove the given thesis, are that the thesis does not tell the whole story and that the human limitations of the members of the jury make it impossible for them ever to master all the facts about a historical thesis covering a long period and thousands of acts, all admittedly lawful in themselves.

What we are tilting against in this book in this connection is the use in criminal prosecutions of historical theses, whether to convict a large corporation of a conspiracy to restrain trade or a group of so-called crackpots or agitators to cause insubordination in the armed forces or the overthrow of the government by force. Whether it is a conspiracy case against a large corporation or against a group of agitators whom certain other agitators want to have prosecuted, the basic principle at issue is the same: the government undertakes to prove, by means of a historical thesis that takes months to present, that a selected pattern of lawful and normal acts and utterances constitutes the conspiracy charged; and no jury has a right to draw such a conclusion from evidence of that nature, largely because the evidence is insufficient or does not give a complete picture and because a complete picture is practically impossible to present in respect of such a vast mass of acts.

The real trouble with the Department of Justice's prosecutions of large corporations for monopoly is that the Department is really trying to punish something against which there is no law, namely, bigness in business. The Department of Justice charges monopoly; proves bigness and asks the jury to conclude that bigness equals monopoly. In some ways it does. But if bigness equals monopoly and monopoly is a crime, then all big business should be reduced to whatever size is small enough not to be criminal. The way to do it is not by criminal prosecutions of monopoly against a few big businesses. The way to do it is by a law specifying how large a corporation may be without becoming a monopoly. It is a travesty on justice to try to prove monopoly by proving bigness, just as it was in the Sedition Trial for the government to attempt to prove that anti-Semitism equalled causing insubordination in the armed forces. Such prosecutions breed contempt for the law and the courts because they are essentially crooked in their reasoning and basic premises. There is nothing more dangerous in a free society than a Department of Justice that tries to usurp the functions of Congress. If Congress wants to legislate big business or anti-Semitism out of existence, let it do so, if it can. But let us not have a Department of Justice usurping the legislative function by prosecutions based on crooked legal reasoning.

It is important to understand clearly that the reasons why a historical thesis can never be susceptible of proof are essentially quantitative and matters of the limitations of human nature. A jury can competently reach a valid conclusion as to whether an act was committed at a given time and place, as to whether it was committed by one or more named persons, and as to the quality of that act in terms of intent—was it murder, manslaughter or justifiable homicide? The essential reasons why a jury verdict on such issues of fact will be right most of the time are that the evidence about one act or event occurring within a small sector of time and space can be presented with considerable fullness to a jury and weighed by each member of the jury. But a historical thesis about events, millions in number, occurring all over a nation or all over the globe, over a long period of time, and involving the motivations of millions or even hundreds of individuals or large groups or classes—so vast a pattern of facts simply cannot be weighed by any jury.

The reasons why a historical or a political thesis cannot be tried by a jury are purely quantitative in relation to the limitations of the finite mind. For one thing, all the facts necessary to a proper weighing of a historical thesis can never be presented to any jury; the facts are too numerous and complex; it would take years to go over a small part of the relevant facts. For another thing, no finite mind can possibly give the consideration to all these facts necessary for a well-reasoned conclusion as to what they prove in reference to any given proposition about the historical period and the factors of intent, cause and effect, personalities and events in question. A jury may decide what happened at one time and place but not what happened over a long period of time and why and how it happened. The controversy over who is to blame for Pearl Harbor proves our contention up to the hilt.

Only an infinitesimally small fraction of the facts about any historical period or any historical question can ever be considered by a jury or even a historian. This fraction of the facts is too small to sustain a valid conclusion. A cupful of sea water may be enough to validate a generalization about the chemical content of all sea water. But a cupful of dirt taken from one spot, or a hundred cupfuls of earth taken from as many different parts of the globe, would not suffice to enable a chemist to state the chemical composition of the entire earth. In fact, no single or brief generalization about the chemical composition of the globe can be valid by qualitative analysis. It should be remembered that a series of selected historical data are just small cupfuls of facts taken from a mass of data in the historical period covered, a mass that stands quantitatively in about the same relation to that selection of facts that the earth stands to a selection of several hundred different cupfuls of earth, all taken near the surface.

The great scientist Albert Einstein, writing in the introduction to Planck's book *Where is Science Going?* states the problem we have just been discussing in respect to the physical or natural sciences in the following apt words (page 10):

> Therefore, the fact that in science we have to be content with an incomplete picture of the universe is not due to the nature of the universe but rather to us.

In other words, the universe is too big for the mind of man. The human mind is not capable of observing all the relevant facts about most big scientific problems. Every day science is scrapping what was taught yesterday and adopting a new theory or hypothesis. Scientists recognize that what the unscientifically minded call scientific truths are merely tentative hypotheses which observation and experiment have as yet not proved false or untenable. History is like science in this respect. The impossibility of final and conclusive proof is the governing fact about big scientific hypotheses and historical theses. This does not mean that new research is likely to prove that the earth is not round or that Abraham Lincoln was not shot in the Ford Theater, Washington, at 8:18 P.M., April 15, 1865 by John Wilkes Booth. It is feasible to prove the occurrence of certain single historical events or the truth of certain single factual statements, about the natural world. It is not possible, however, to prove conclusively the correctness of vast historical theses or of many scientific theories. The reasons for the difference are purely quantitative and inherent in the limitations of the human mind—limitations to what the mind of man can observe and record.

The government could never have proved the historical thesis it alleged as the basis of the criminal charge in the Sedition Trial though it could easily have proved the commission of specific acts by the defendants in violation of the law under which the indictment had been brought, if there had been any evidence of such acts. No case like that of the government in the Sedition Trial should ever be tolerated for five minutes in any court of law. History is not evidence. The commission of criminal acts is susceptible of proof along well established lines of procedure under the rules of evidence. The truth of a historical thesis, or of a mass of historical or political interpretation, is never susceptible of proof with a similar degree of certainty or, rather, probability of certainty.

What makes the particular abuse of justice by the government especially dangerous is the enormous advantage of the government in the way of personnel and resources for rigging these long and expensive trials. The federal government has literally hundreds of college professors, teachers, writers, and experts on its payroll. A prosecution case compounded over a period of months out of the brain children of these experts and presented as a surprise to the average defense lawyer is so much Greek to him. He is afraid to cross-examine in a field in which he knows nothing. In such cases the defense lawyers should always either be somewhat expert in the social sciences, particularly psychology, psychiatry, political psychopathology, political theory, history, and modern political isms and propaganda or they should have associated with them in the defense experts in these fields both to help prepare the defense and to direct cross-examination of expert government witnesses.

Such expert assistance for the defense, of course, would cost money which poor defendants in free speech cases do not have. The government purposely picks the poor anti-Semites or the poor anti-communists or the poor isolationists and not the rich ones to rig tricky sedition prosecutions against. In the Sedition Trial in which all but four lawyers were court appointed and unpaid, the unpaid part of the defense, or four-fifths of it, simply could not have had the benefit of the aid of necessary experts.

In this connection a further handicap of defendants in free speech cases, even where the defendant has the money to hire competent legal counsel and pay reasonable expenses, is this: most good lawyers, especially those who get high fees, are extremely conservative, traditional, orthodox and given to over confidence in their own unaided ability to meet any situation that may arise in a criminal trial. If such lawyers are confronted in a free speech case, which they rarely understand, with a surprise prosecution trick like the Lasswell method of showing similarity with a view to proving guilt thereby, they are utterly helpless both in cross-examination and rebuttal. To give them a fair chance, the judge would have to continue the case while they were reading up and consulting experts, assuming they were disposed to do so, and, also, that they had the means to hire such experts.

On this general subject it is pertinent to remark that no matter how good a trial lawyer the given counsel may be, he is sure to be helpless against an expert in a field with which he is completely unfamiliar. He may mask his ignorance of the expert's field by a display of knowledge of the law and proficiency in the mechanics of legal procedure such as cross-examination, objection and argument. But when one kind of knowledge is needed, another kind of knowledge will not fill the bill. The best lawyer normally cannot substitute for the most mediocre physician or even plumber.

The unfair advantage the present federal government has in cases of this kind is that it goes to trial not just with a battery of lawyers, who can be matched with an equal number of defense lawyers, but, also, with the federal bureaucracy consisting of all sorts of specialists and experts who have worked on the prosecution. In such cases a conservative or traditionalist lawyer for the defense is apt to take the mistaken position that if the expert's testimony is too much for him it will also be too much for the jury. The expert's testimony may not be any better understood by the jury than by the defense lawyers. But, where the defense lawyers take the position that what they don't understand doesn't matter, the jury is likely to take the position that what they don't understand does matter, unless they are made acutely aware by defense cross-examination that they simply do not understand what they thought seemed so simple and obvious.

The jury members are also likely to reason that if the defense lawyers do not attack impressively government expert testimony, it is because such testimony proves the government's case beyond possibility of successful refutation. Defense lawyers may not be impressed with what they don't understand, but most persons are terrifically impressed by what they don't understand, even sometimes when it is utter nonsense.

Jury members are apt to reason that if the government expert did not prove anything, the judge would not let him testify over defense objections; that if the government expert proves anything, it is the guilt of the accused; and that if the expert testimony is not controverted and attacked in some way by the defense, it must have proved the government's case. Here it is to be remarked that expert testimony is largely a matter of creating on the jury a certain impression rather than in imparting knowledge or understanding to the jury. The average juryman, like the average defense lawyer, does not understand the expert. He is merely impressed by him, favorably or unfavorably to one side in the trial.

Many lawyers are apt to take towards hostile expert witnesses whose testimony they do not know how to meet an attitude reminiscent of the remark of a great statesman and a notorious cynic, a British Prime Minister who first made Britain an empire and a British monarch an Empress. Disraeli, Earl of Beaconsfield, once said that there were two ways to master the other fellow: one was to despise his qualities and the other, to surpass them. Thus, if the chap was a boxer, you either outboxed him or took the position that boxing was of no consequence. If the fellow was a learned Oxford don, you either displayed more knowledge than he possessed or else you took the position that his knowledge was not worth knowing. If you got away with it, the other fellow looked up to you as his superior and others so regarded you. Well, in a criminal trial, it may soothe the lawyer's ego to despise the expert with whom he is not able himself to cope, and to treat the expert's testimony as so much bunk. But it will not help the defendants for a lawyer to assume that the jury will take the same attitude towards an expert who is unchallenged by the defense. This, Pelley had opportunity to learn to his sorrow.

The second highest paid lawyer on the defense in the Sedition Trial wrote his client a short time before the trial that he would have to wait until he had had opportunity to learn the government's case in the course of the trial before he could decide on a defense. The client dismissed that attorney a week after the trial started and three weeks before the selection of the jury had been completed, thereafter conducting his own defense. He made the opening statement for the entire defense. Any lawyer who has to wait to learn the government's case in the course of the trial from the government attorneys and witnesses in any free speech trial will not be able to make an adequate defense. And a lawyer who is not widely read in political science and philosophy, in several of the social sciences, including particularly, history, psychology, economics and the new political isms, simply cannot conduct, unaided by experts, a good defense in a free speech case. No lawyer, no matter how talented, could cope with a case such as the government had in the Sedition Trial if he got it for the first time in the court room in the course of the trial. One must have a pretty good inkling of the case beforehand, plus a thorough grounding in the particular mental disciplines of the experts the government is going to use.

In the Sedition Trial it happened, as already stated, that defendant Dennis knew completely Rogge's case in theory from a six hour conference which Rogge, hoping to learn something from Dennis, was unwise enough to give him, and, also, from an omnivorous reading of all the press and radio propaganda in favor of the Sedition Trial by the people behind it, whose directives Rogge had to carry out in putting on the show for them on orders from higher up. In addition, Dennis was, himself, something of an expert in the field of the government's star, expert witnesses. Here we use the word expert in the sense that anyone is an expert who can get paid as an expert. For nearly twenty years prior to the trial Dennis had been paid for writing books and articles and for delivering public lectures and holding debates in the fields of the government's experts. He was picked to be one of the four speakers for the first Town Hall Meeting of the Air ten years ago. Thereafter, he appeared two or three times on that program. He had debated for pay on the public platform with prominent New Deal braintrusters such as A. A. Berle, Jr. and Raymond Moley, with communists like Earl Browder, socialists like Norman Thomas, Scott Nearing, Upton Sinclair, John Strachey, liberals like Dorothy Thompson and Raymond Leslie Buell and dozens of college professors. He had spoken on foreign affairs before about every branch of the Foreign Policy Association in the country. And he had nearly always spoken for pay before hostile audiences which disagreed with most of what he had to say. Incidentally, he had been a star debater at Harvard thirty years before.

When Dennis came to Washington for the Trial he got a desk assigned him in the Library of Congress where he kept a typewriter and spent most of his spare time preparing to tilt with the government's expert witnesses. The first week of his stay in Washington he called on a government expert, a former Yale professor who had written a book on propaganda and was in Lasswell's field, and spent an entire Sunday morning discussing the theory and fine points of Lasswell's propaganda analysis. This undoubtedly got back to Rogge. Sometime later Max Lerner, an editor of PM with whom Dennis had also debated, wrote in that organ, which was one of Rogge's principal house organs for the Sedition Trial, that Dennis had prepared to attack Lasswell but that Rogge was going to fool him by not putting on Lasswell. It was a bit of a disappointment to Dennis that he did not have a go at Lasswell in the Trial, as he was looking forward to exploring Lasswell's many political theories, largely based on Freud's abnormal psychology and sex psychoses. All this would have been necessary to an understanding of the Lasswell method of propaganda analysis, the major purpose of which was to serve as an instrument of what Lasswell, in a chapter devoted to that subject—*The Politics of Prevention*—called the prevention of free discussion. Lasswell's ideas about preventing free debate and explaining political motivations in terms of abnormal sex psychology would have made interesting material for the consideration of any jury. But, though Dennis was denied the opportunity to explore Lasswell's subconscious and air his theories in the court room, he was able to work on government expert Rauschning for four consecutive days, having prepared therefore with complete annotations of all Rauschning's writings. When Rauschning was put on the stand, Dennis had Rauchning's entire works on his desk.

The authors give Lasswell as much attention as they do chiefly with a view to helping lawyers who may have to battle for the constitutional rights of American citizens in future free speech cases in which a Department of Justice, lacking respect for civil liberties and fair play, may bring in experts in the social sciences to impress the jury with the guilt of the accused by the misuse of some technique of the social sciences on the lowest level of charlatanry. There is only one way to conduct a defense against this sort of learned hokum put to the service of an unscrupulous prosecution in a free speech case. And that way is to have expert assistance in the field of the given expert witnesses with a view to bringing out by cross-examination all the facts and theories connected with the given use or abuse of the social scientist.

Many a lawyer, not understanding the problem, will object to this kind of a defense on the ground that it unduly prolongs the trial and confuses both the jury and everyone else in the court to the supposed detriment of the defendants. The answer is that if the government puts on that sort of a case, time and labor must not be spared to beat it; and that if the government tries to win by over-simplifying, the defense must beat it by de-simplifying. If the cross-examination leaves the jury with the impression, correct enough, that they do not and cannot understand what it is all about, they are little likely to convict on evidence they see they don't understand. The mortal danger for the defendants and for justice and fair play in a civil liberties case in which the prosecution mobilizes a lot of experts and puts on a phony scientific proof of its charges is that the jury will get the false impression that they understand something which is neither true, understandable nor logical. To beat such a prosecution, what is most needed is to show the jury by cross-examination of the government's expert that the government's case does not make sense and that when it is fully analyzed no one can be clear about it or understand it. This may seem to the superficial observer like confusing the case and befuddling the jury. But it is the only way to beat certain types of intellectually dishonest prosecution cases where freedom of speech and the quality and meaning of words are the issues. It is easy to make a lie simple while the truth is often far from simple.

During the Sedition Trial, lawyers and others in the case would sometimes walk out on cross-examination by the authors of this book and afterwards tell them that they could not understand either what the government expert witness was testifying to or just what the cross examining authors of this book were trying to bring out in cross-examination of such witness. The jury members, who could not walk out when bored, probably followed this cross-examination better than most of the spectators. Whenever the authors got criticisms or comments of this nature, they were delighted, for they knew that their cross-examination was proving highly successful. They were not trying to simplify, explain or clarify either the testimony of the government's experts or the government's case, so as to enable any one to jump to conclusions. They were convinced that both this testimony and the government's case were largely confused, unintelligible and contradictory. If they got this across to the jury, they had achieved their purpose. An average jury will not convict on evidence it knows it does not understand, or that is demonstrated to it to be confusing and susceptible of all sorts of different and contradictory interpretations. The defense danger is that a jury will think it understands something it really cannot understand—something no one can understand.

The responsibility for preventing a trial from being turned into a farce through having the absurdities of the government's case brought out on cross-examination and objection to improper evidence rests on the trial judge. The farce can be ended any time he chooses to lay down the law to the prosecutor and limit him to presenting only evidence that *is evidence* in support of the charge, or, in these types of cases, evidence that proves intent and clear and present danger. Evidence that does not prove intent or clear and present danger should not be admitted. If the judge will allow evidence to be put in that does not sustain the government, as happened in the five civil liberties cases we have repeatedly cited in this book, in which the Supreme Court in the past three years has reversed the lower courts each of the five times on the ground of insufficient evidence, then the only thing for the defense to do is to try by cross-examination and argument in support of objections and motions to strike such testimony from the record to get it across to the jury and on the record for appeal that the evidence does not fit the charge. If this turns the trial into a farce and helps prolong it indefinitely to the detriment of the prestige of the judiciary and the health of the judge, let it be a lesson to all concerned to heed the precepts of three centuries of free speech doctrine from Milton's Areopagitica, published in 1644, down to the latest Supreme Court decision reversing the lower courts in a free speech case.

Among the chief purposes of the authors of this book in offering it to the American public is to emphasize the menace to civil liberties and good government inherent in improper prosecutions and investigations conducted to serve either the personal ambitions of politicians or the interests and policies of minority pressure groups. The only effective correctives are publicity and public education. In theory, a criminal investigation or prosecution by the public authority should be a judicial or quasi-judicial proceeding, the purpose of which is to ascertain the facts and to do justice. But while this is the theory, propaganda and ballyhoo can often induce the public generally to take a different view of the proceeding. According to this view the criminal investigation and prosecution are features of a crusade of good against evil, in which the public prosecutor is on the side of righteousness and those under investigation or indictment are on the side of the devil.

Now, in order to apprehend and convict the guilty, it is never necessary to create any such state of mind about the quasi-judicial functions of the public prosecutor. Juries and judges do not have to be pre-conditioned by press and radio campaigns against persons under investigation or indictment, especially where the defendants are charged with sedition or with forming part of an alleged crime wave. The criminal cases in which the state stands to lose because of jury bias or prejudice are almost always cases about which it would be impossible for the state to get publicity favorable to the prosecution and unfavorable to the defendants. Whenever the state can get pre-trial publicity favorable to the prosecution and unfavorable to the defendants, the state does not need such publicity to convict the accused if there is any evidence against them. Briefly, there is never any justification from the point of view of the public interest for trying a case in the newspapers before it is tried in the courts.

Two types of interference with criminal law enforcement are here to be pointed out: first, in terms of general principle; second, in terms of concrete examples, one of which, of course, was the Sedition Trial. The first type is that of the private ambitions of a politician who uses law enforcement as an instrument of making his career. The other type is that of the minority pressure group which uses, or causes those in charge to use, law enforcement as an instrument of policy and interest.

Whenever either type of interference with law enforcement occurs, a miscarriage of justice and impairment of public confidence in the courts are sure to result. It is important to understand the mechanics of these types of abuse of the law enforcement function. It is a somewhat dubious feature of American politics that the function of public prosecutor has so often proved the making of the political career of an otherwise mediocre young lawyer and that law enforcement has so often proved an instrument of political warfare for minority pressure groups like the Anti-saloon League, the Anti-defamation League or the C.I.O. In England it would be hard to name an outstanding figure in public life who owed his political rise to having crusaded as a public prosecutor. And it would be even more difficult to match examples of our pressure groups causing political prosecutions to be made to serve group purposes. Now there is nothing wrong with any politically ambitious young man starting his public career as a prosecuting attorney or with any minority asking for better law enforcement. But there is everything wrong with mixing politics with law enforcement which should be routine and non-partisan.

In a judicial or quasi-judicial proceeding the end should be justice and one of the means, impartiality. It is human to err. This human tendency is greatly increased in any judicial proceeding which degenerates into a political, ideological or class conflict. In measure as a prosecutor regards himself as a crusader and his function as a crusade he loses ability to weigh facts objectively and to exercise impartial judgment. Once a judge or jury is brought to take the attitude towards a trial that it is a battle between good and evil rather than a proceeding in search of truth, they are incapable of functioning properly under our or any other judicial system.

It is easy to take the view that results, measured by the number of convictions, are all that really matter in law enforcement. Taking this view, one readily finds that prosecutor best who makes most prosecutions and wins the highest percentage of convictions. Once a prosecutor takes such a view, he is not only apt to err more than would be normal but he becomes wholly unfitted in mood to weigh facts objectively or to exercise sound judgment about them. The same is true of a judge or jury.

It is easy to reason that the end justifies the means. But this reasoning will lead a prosecutor to intellectual dishonesty and sharp practice. Given enough propaganda favorable to this attitude, the public will applaud convictions and condone unethical means of obtaining them. If some innocent persons are incidentally convicted, it will be said in extenuation that this was a price that had to be paid for a high percentage of convictions and that such miscarriages of justice as later come to light are most exceptional, which will not be true. But the over-all or long-run results are distinctly bad for the ends of law and order and good government.

Once the public finds reason to question the fairness of law enforcement agencies or to become allied in sympathy and practical measures of self-protection with violators of the law, by reason of known instances of abuse of the law enforcement function, as happened repeatedly under Prohibition, and as will invariably happen where law enforcement agencies use unethical methods, the net result for law and order and good government is disastrous. To enjoy the support of public opinion and the cooperation of the people, the state must be eminently just in all its law enforcement activities and procedures.

Let is not be assumed by those who pride themselves on being hardboiled realists that any sharp practice by the public prosecutor which gets results in the way of increased convictions will in the long run serve the ends of maximum convictions and minimum crimes. The would-be realist will find, as time goes on, that the public will react to exposures of bad faith and unethical procedure on the part of law enforcement authorities by refusing or failing to convict defendants who are clearly guilty and by general non-cooperation with the authorities. Just as the public can be led by propaganda to convict the innocent on insufficient evidence due to misplaced confidence in the public prosecutor, the same public later on can be led to acquit the guilty on repeated disclosures of abuse of this confidence by the public prosecutor. It works both ways. In government the long run view should always be taken.

In any criminal law proceeding, whether of investigation or trial, punishing the guilty is of far less importance than preserving the reputation of the law enforcement agencies and retaining the respect of the people for the law and its agencies. The very concept of the state waging war through its law enforcement agencies against crime or evil is not conducive to the right attitude among the people towards law and order. This concept dramatizes and romanticizes crime and the criminal. The movies, the comic strip, the toy makers and J. Edgar Hoover of the F.B.I. have long played up this dramatization of the so-called war on crime by the law enforcement agencies. The dramatization pleases juvenile minds and the head of the F.B.I. But it gives to crime and the criminal a place in the imagination of the young, the immature and the emotionally susceptible which is not helpful for the purposes of a good society. Dramatizing a so-called war on crime may be good theater and good publicity for J. Edgar Hoover and any young district attorney with an eye on a higher office, but it is not good child psychology or good mass psychology.

This dramatization of the idea of a war on crime, broadened during the war to include the idea of war on Fascism and un-American ideas and activities, doubtless has its origins in the early and frontier days of the Nation. Then pioneer communities would form posses or vigilante committees to fight the Indians or cattle rustlers and to catch and do summary justice to bandits and bad men generally. This part of the American tradition is largely responsible for lynchings, a form of lawlessness that is unknown in modern times in Great Britain or the orderly Scandinavian or Low Countries. In a community that has attained maturity and stability, lynchings are unheard of and so, also, is the idea of the state, through its law enforcement agencies, being engaged in a sensational domestic war on crime, political heresy or badness in general. The proper performance of the judicial function has nothing of the sensational about it. In no sense is it a crusade or a phase of a civil war. The attitude of the people towards their courts and law enforcement officers should not be the same as their attitude towards their boys marching off in uniform to a foreign war. The martial spirit has no place in judicial or quasi-judicial proceedings. Nor has a revolutionary spirit. In a free society the press cannot be prevented from reporting crime and criminal trials, but law enforcement agents should not conduct their activities with a view to obtaining maximum and optimum publicity. In other words, a prosecutor or a judge, a United States Attorney General or prosecuting attorney, or a chief of the F.B.I. who plays to the gallery is not properly performing his duty.

The young politician using the office of public prosecutor as a stepping stone to the governorship or the presidency tries his cases in the newspapers and whips up a false and dangerous popular enthusiasm over his activities. For these he gets more money and more assistants than his predecessor. He scores more convictions. Intoxicated by success and the plaudits of the press, he lets his zeal run away with his better judgment. He dramatizes his office and degrades his function by cheap publicity. Incidentally, he causes grave miscarriages of justice.

Law enforcement can stand some dramatization. But it must be of the right sort. The conduct of the Supreme Court of the United States furnishes an example of the right sort; stunts of the Department of Justice, the F.B.I. and immature district attorneys running for higher office are examples of the wrong sort of dramatization of the law enforcement function. They serve the ends of cheap careerists on the make, but they disserve the ends of good government and a good society.

Having thus stated the central problem in somewhat general terms, the authors now call attention to the latest concrete case in point to receive considerable public attention. This is the case of Bertram Campbell who, as this book was being concluded, had just got his false conviction of forgery by Thomas Dewey's crusaders some seven years ago cleared up by a pardon from Dewey, now Governor of the State of New York, and who was by way of getting a special bill through the New York legislature to compensate him for the three years and four months he served in Sing Sing of a five to ten year sentence he was given for a crime committed by another man whose recent confession was needed to clear Campbell.

Now the Campbell case, while not exactly like the one that is the subject of this book, presents many striking and instructive similarities to it and to other recent and current examples of abuse of the law enforcement function by ambitious politicians and unscrupulous minority pressure groups. It so happens that one is now permitted by the findings in the Campbell case to point with unimpeachable authority certain obvious morals, not by statement of general principles but by citation of a concrete example involving a public prosecutor who was a candidate for the Presidency in the last election.

Campbell was not, as it was at first made to appear, just the unlucky victim of the sort of error that happens once in thousands of cases in the best run courts. Campbell was the victim of an improper and unwarranted prosecution, the like of which is all too frequent, but rarely, as in Campbell's case, exposed by a subsequent investigation. The contention of the authors of this book is that the defendants in the Sedition Trial were the victims of an improper and utterly unwarranted prosecution. The chief differences between the two cases which probably explain why the defendants in the Sedition Trial were not falsely convicted like Campbell were that the prosecution undertaking was bigger and more difficult while the defense was also bigger and more nearly adequate in the Sedition Trial.

A prosecution is not improper just because it results in a conviction which is later reversed on appeal or because it fails to secure a conviction in the first instance. A perfectly proper prosecution may secure a conviction that is later reversed on some technical ground unconnected with any flaw in the prosecution. Or it may quite simply fail to secure the right verdict of guilty from the given jury. What makes a prosecution improper and unwarranted is a set of facts or valid considerations so indicating, all of which should have been taken into account by the prosecuting authority or a judge having jurisdiction in the case. Improper prosecutions are brought usually because those responsible for them refuse to take into account all the relevant facts and valid considerations that should control their decision. Why they refuse or fail to take these facts and considerations into account can usually be explained in terms, not of honest error or inadequate means of learning all the facts but of personal or minority group interests and pressures.

The Campbell case is by no means unusual or exceptional except in that Campbell had the good fortune to be cleared by a confession of the real culprit and to have his false conviction investigated and reported on by a competent and courageous attorney, acting in this matter for the Bar

Association. His findings and published statements, which have been confirmed to us and from which we freely quote, permit us to illustrate concretely the evils and dangers of an improper prosecution, the exposure of which is the major purpose of this book.

Attorney Robert Daru, who is also counsel to the Federal Grand Jury Association of the Southern District of New York and a former counsel to the United States Senate Committee on Crime, was asked by Herman Hoffman, president of the New York County Criminal Courts Bar Association to conduct a thorough investigation of the Campbell case, after his innocence had been conclusively established by the confession of the perpetrator of the forgery for which Campbell was falsely convicted. The judge, in sentencing Campbell, also punished him for what the judge called rank perjury in having taken the witness stand and denied his guilt.

Branding as an ''atrocious practice'' the procedure of the criminal courts in considering a defendant a perjurer when found guilty of a crime which he denied having committed, Daru said that it was a ''heads we win and tails you lose formula.'' Daru stated further that ''The threat that if a defendant stands trial and is convicted, he will be punished also for perjury consisting of his denial of guilt and testifying to his innocence is used every day in the week to bargain with defendants to plead guilty to lesser charges on promise or expectation of suspended sentences or light punishment. It is common knowledge that to avoid this extra-legal danger, defendants plead guilty, saddling themselves for life with criminal records in the hope of getting suspended sentences or to receive comparatively light punishments for crimes of which they continue to assert their innocence.''

At the time Campbell was getting his pardon from Governor Dewey and hoping to get a bill through the New York State legislature compensating him for the false imprisonment he had suffered, Daru had the following to say about the case: ''The most shocking part of the Campbell case has not yet been disclosed, as we did not wish to prejudice Campbell who was at the mercy of his former prosecutor, awaiting not only a pardon but a recommendation for compensation.'' Daru stated, however, that ''Mr.

Dewey's goal (while district attorney) of 100 per cent convictions and his having attained 98 per cent will be shown as one of the principal causes of what happened to Campbell.'' He said that his investigation would seek ''to prevent more Campbell tragedies and to learn how many more Campbell cases exist.'' Preliminary investigation of other allegedly unjust convictions under the Dewey regime had already begun. Daru said that, if given ample resources for a full investigation, he could turn up any number of other cases of false conviction on inadequate evidence similar to Campbell's case.

Campbell was convicted on circumstantial evidence plus mistaken identification by witnesses who, according to Daru, had been tampered with or fixed by those who were out to get a conviction at all costs. According to Daru, ''Inference was piled on inference and suspicious circumstances used in this conviction dissolve into thin air on examination. According to newspaper stories, reporters who saw Mr. Campbell and the real forger, Alexander D. Thiel, in court together the other day, said there is no real resemblance between the two men. When Thiel confessed to the forgery for which Campbell served a three year and four month Sing Sing term, it was reported that officials said the two men bore an amazing resemblance. A reporter now has asked me if I know why Campbell was apprehended in the first place—whether there were reasonable grounds to suspect Campbell was the criminal. The answer is definitely 'no'.''

Daru said that the so-called suspicious circumstances that involved Mr. Campbell ''Not only fail to incriminate Campbell, but, as a matter of fact, point to Campbell's innocence and should have convinced anybody that Campbell was not the man who committed these crimes.'' Said Daru: ''Campbell should not have even been subjected to a confrontation of witnesses to then be mistakenly identified.'' ''The so-called suspicious circumstances had they been carefully examined and considered by a person not bent on solving this wave of forgeries by convicting somebody for this crime would have clearly indicated Campbell was not the criminal.'' ''Suspicion was added to suspicion, inference was pyramided on inference, until the whole case was just a house of cards in which the suspicions and the proof dissolve into thin air on ordinary and simple analysis."

According to Daru "it has been clearly established that two bank tellers and a cashier were coached in their testimony by which the identification of Campbell was framed by the use of a picture of Campbell with a dubbed-in mustache. As these investigators worked unofficially as secret investigators in the case, it was unnecessary for them to appear in the open, to take the stand and testify and be cross-examined in court. Had they been required to testify, the court and jury might well have learned the truth of the framing of the identification and this miscarriage of justice might have been avoided, had the cross-examination been skillful."

Daru pointed one of the morals of the case when he said: "The court and jury assumed, and had the right to assume, that this was the case of the State of New York against Bertram M. Campbell. If the court and jury had known that in fact this was a bankers' association against Campbell, or private detectives out for a scalp to 'solve' a wave of forgeries, there might have been a different story to tell." "So reckless and offensive to justice was the bungling work of the secret police in this case, that certain of the competent and responsible representatives of various banks involved became alarmed, notified their superiors and washd their hands of the matter, flatly refusing to have anything to do with the prosecution of Campbell."

Daru said that he had been warning the Bar Association for years against the danger of allowing "secret police" to enter criminal cases. The conduct of such police, Daru stated, is as un-American as that of a gestapo and just as injurious to victims. He is drafting strong recommendations to the State legislature with regard to private gestapos.

In the Sedition Trial case there had been the same sort of intervention by secret agents acting for certain pressure groups. These agents and the organizations behind them had supplied much of the evidence which Rogge counted on to convict the defendants. But one big difference was that in the Sedition Trial fearless and persistent defense counsel, through cross examination and argument, exposed the interests and methods behind the prosecution much to the apparent annoyance of the presiding judge who was visibly disturbed by seeing the government's case thus put on trial. Those who criticize the defense lawyers for having done this should now reflect on what happened to Campbell whose counsel did not do as much for him. Daru stresses this point about the Campbell case.

Daru's report on the Campbell case brings out a main point of this chapter on beating an improper prosecution, namely, that of the absolute necessity for the defense in any case in which there has been intervention by outside interests with the use of gestapo methods and agencies to bring out fully on cross examination and in argument over the admissibility of such evidence all obtainable information about these interests, agencies and methods.

Daru expressly stated that it would have done Campbell no good to have won on appeal a reversal of his conviction and a new trial if his defense had not exposed the gestapo-like agencies and methods used to convict him falsely the first time. Without such exposure, the second trial jury would have convicted him a second time since the same witnesses who mistakenly identified him the first time would have repeated their wrong identification. Not to have done so would have exposed them to a prosecution for perjury on account of their testimony at the first trial. The moral is that a defendant up against a crooked prosecution needs a tough defense lawyer who will not spare the feelings of any one, including the trial judge and prosecutor. The defendants in the Sedition Trial had such defense lawyers.

Dewey's assistant secured the false conviction of Campbell by selecting a pattern of circumstantial evidence, spinning a clever theory to fit that pattern and generally oversimplifying and misinterpreting the facts of the case. It need not be supposed or assumed that Dewey's assistant or Dewey knew that Campbell was innocent or doubted their prosecution case. Once a prosecutor sets out to make a record for convictions, he can easily convict an innocent man in the firm belief that the latter is guilty. The prosecutor need only open his mind to all facts and considerations pointing to guilt and close his mind to all that point the other way.

Of course, a prosecutor asking a grand jury for an indictment and a trial jury for a conviction should not do this. Before asking for an indictment, he should try to weigh all the available evidence and ask for a true bill only if he finds all the available facts fit only the hypothesis of guilt. But how often is this not done by public prosecutors! How often does the present-day prosecutor, regardless of the facts, attempt to carry out the directives of his superior or to act in the matter according to the indications of personal self-interest or in a way to please certain minorities or interests from which he expects great things!

In conclusion, it may be said that against an improper prosecution the only adequate defense is one that seeks to expose by cross-examination and argument during the presentation of the government's case the purposes, motives, people and methods behind the prosecution, even at the risk of turning the trial into a farce or a brawl and endangering the health of any participant with a weak heart. Without such exposure, a crooked prosecution may obtain a conviction which will be sustained on appeal simply because the crookedness of the prosecution will not have been exposed and thus put on the record for the appellate court to consider. The chances are, of course, that if the crookedness of a prosecution is exposed by cross-examination during the trial, there will never be any need for an appeal. The jury will take care of that. But a jury cannot be expected to penetrate a veil of secrecy and misrepresentation which defense cross-examination does not tear away. Beating improper prosecutions is one thing; preventing their recurrence is another. In either case, exposure is the chief means. For the prevention of such improper prosecutions, the one great instrumentality is public education about the evil such as this book undertakes. The authors are proud of having helped to beat an improper prosecution. They hope through the publication of this book they will contribute to the prevention of another such farce as the Sedition Trial, exactly as Attorney Daru hopes through his investigation of and report on the Campbell case he will contribute to an avoidance of repetitions of the same injustice to other innocent men.

CHAPTER XX.

FAIR PLAY.

Almost everything about the Sedition Trial was offensive to a sense of fair play. This, doubtless, is why the British put on no such show in their courts during the entire course of the war, and why they released the so-called British Fascists, including the Fascist leader, Sir Oswald Mosley, from preventive detention long before the war's end. The Canadians, likewise, released Adrien Arcand, a so-called Canadian Fascist, from preventive detention in the Spring of 1945. Both Mosley and Arcand were named as co-conspirators in Rogge's and Biddle's world conspiracy, according to the bill of particulars. The British, as we have already seen, never considered trying Mosley, or the Canadians, trying Arcand on a criminal charge in connection with their former political activities.

We should like in this chapter to call attention to certain features of the Trial involving different types of unfairness which are not elsewhere dealt with in this book and which do not strictly form part of the development of the big idea of the book, namely the idea that the Trial was a farce because the government did not have evidence to fit the law or the charge. In the general digression of this chapter on fair play, a topic which may seem highly irrelevant in any discussion involving Biddle's Department of Justice, there is first and foremost to be pointed out the injustice of labelling all these defendants as Fascists or National Socialists and of trying to make them all out to be co-believers in and co-workers for a single political ideology, called Nazism or Fascism.

If they had conspired to cause insubordination, that fact, alone, without any details about their beliefs, would have sufficed to convict them. If they did not so conspire, and if their conduct did not prove their conspiring, no possible evidence about their political beliefs or the beliefs of the Nazis could possibly matter.

We cannot go into detail about each defendant with a view to answering the question: "Well, if he wasn't a Fascist, what was he?" We see no sense of fairness in the use of the term Fascist or Nazi in connection with a trial for conspiracy to cause insubordination in the armed forces unless the defendants are all members of a party, knowing all its criminal purposes, that calls itself Fascist or Nazi and that aims to cause insubordination in the armed forces.

The point we want here to stress under the heading of fair play in political debate or political warfare is this: The Sedition Trial constituted the doing to one group by another group of the very things the latter group had charged the former group with doing to them. But it was not a case of tit for tat because the Department of Justice had intervened in this name calling contest by attempting through a criminal trial to make one set of names stick which one group had called another group. Name-calling is probably unavoidable in political debate and warfare, but it is utterly inexcusable in the processes of law enforcement by the Department of Justice.

The defendants had all been charged by the people behind the Trial with being Fascists, exactly as the people behind the trial had complained of having been called reds by certain of the defendants. For example, George Seldes, a prolific writer and the publisher of a particularly virulent weekly sheet called *In Fact*, had in that publication over a period of years and in some of his books, particularly one entitled *Witch Hunt*, charged many of the defendants by name with having been red-baiters as well as Fascists. Fascists, said Seldes, were red-baiters whom the Department of Justice should prosecute.

Now the authors cannot speak for all the defendants. They lack both the necessary knowledge of the facts and the disposition to do so. Any defense which any defendant may get in this book has to be largely an incident of the book's attempt to explain why the trial was a farce. In the case of the one defendant who happens to be one of the authors of this book, however, it is possible for the latter to write with a knowledge of the facts of the case which they cannot command with respect to the other defendants. The position of the authors, of course, is that whatever any defendant may have been guilty of, no one was, or could have been, proved guilty as charged in the indictment, the evidence being what it is and the record of both the Nazis and the defendants being what it is known to have been.

In regard to the fairness of this business of calling a political adversary a Fascist, a practise no less a personality than former Vice-President Wallace or Secretary of the Interior Ickes publicly indulged in, it may be said that defendant Lawrence Dennis wrote a book way back in 1936, published by the eminently conservative firm of Harper Brothers, entitled THE COMING AMERICAN FASCISM. This book served to get Dennis labelled as a Fascist mainly by reason of the title rather than the contents, which few people ever read. The thesis of this book was that the world, including the United States, faced the ultimate choices of communism or Fascism; that both were alternative or variant forms of the same thing, namely socialism or a more or less equalitarian type of collectivism; that communism was distinctively internationalist, while Fascism was characteristically nationalist in character; that one or the other seemed inevitable due to economic and technological trends; and that Fascism seemed more desirable or less evil as well as more likely to succeed in America . The chief reason Dennis thought Fascism preferable to communism was that the initiation of a collectivist society the Fascist way seemed easier on existing capitalists and involved less liquidation than the communist way. Here it is to be remarked that American statesmen were already saying at the time the present book on the Sedition Trial was being written that we had fought the war to replace Hitler's with Stalin's domination of Europe and that Stalin's was much more to be feared. Dennis foresaw this back in 1935 when he wrote THE COMING AMERICAN FASCISM.

Dennis frequently stated in public and wrote for publication that he was neither a member nor a promoter of any party or ism, Fascist or otherwise, but that he was trying merely to play the modest role of the objective student, observer and interpreter of current trends. He also said, repeatedly, that America would probably, much to his regret, go Fascist fighting Fascism, or as a result of fighting Fascism. He said he thought that it was no business of the American people what kind of ism any foreign nation adopted or followed. And Dennis was particularly emphatic in saying that he could not see the sense of America fighting a war to stamp out Fascism to make communism master of Europe and Asia and to establish Fascism in America. If we had to go Fascist, why not do so without fighting a needless and silly war against the system we were going to adopt? Why destroy Fascism and replace it with communism throughout Europe in order to go Fascist in America? Dennis thought it did not make sense.

Dennis invariably charged that the spearhead of the movement towards Fascism in America was President Roosevelt and the New Dealers. He so stated in a statement published in *The New York Times* in 1941 replying to a smear by Secretary Ickes calling Dennis, Father Coughlin and Lindbergh American Fascists. What Dennis argued most against, down to Pearl Harbor, was what he considered the absurdity of fighting abroad something called Fascism that Americans were getting at home under another name due to the play of world-wide economic and technological changes that had created Fascism in Italy, Nazism in Germany, the Soviet regime a little earlier in Russia and the New Deal in America.

This is no place to analyze, discuss or appraise the Dennis thesis. Whether he was right or wrong is entirely beside the point. Whether he was wise to pose such a thesis when he did is also not material. The questions in connection with the inclusion of Dennis in the Sedition indictment are whether the expression of these and similar views made him a Fascist or a Nazi as Rogge charged and whether Dennis' opinions proved he was conspiring to cause insubordination in the armed forces as a means to Nazifying the world.

Suppose a writer had said for several years prior to Pearl Harbor that communism and Fascism were the ultimate choices and that communism, as developed in Russia, was the more likely and the more deserving to triumph, would the expression of that view have made such a writer a member of the Communist party, an agent of Soviet Russia or a conspirator to bring about in this country a repetition of all the crimes committed in the name of communism in Russia or to cause insubordination in the armed forces? Obviously, no. There is no freedom of speech unless every citizen has the right to express such opinions, preferences and forecasts without exposing himself to criminal prosecutions such as the Department of Justice brought Dennis into.

The time to pass on the merits of Dennis' thesis is not now. It will come several years hence when the results of America's entry into the war have had time to materialize and to be objectively appraised. But neither then nor now will the merits of his thesis have the slightest bearing on the charge that he ever conspired to cause insubordination in the armed forces as Biddle's Department of Justice tried to prove.

As this was being written, the sweeping victory of the Socialist Labour Party of England was being widely celebrated. The new British Prime Minister, Major Clement Attlee, had just said in a public address on July 26, 1945, to a cheering political mass meeting:

> We Socialists are a great international movement. We have our policy, which we have stuck to all through the years.

Stalin could truthfully have said the same thing. He, too, is a socialist and a member of a great international movement, as well as the head of a national government and its totalitarian party. Is the international socialist movement of Stalin the same as the international socialist movement of Major Clement Attlee and the British Labour Party? Time alone can furnish the correct answer. The authors at this time venture none. But they would ridicule any charge, now or later, that Major Clement Attlee and Josef Stalin, with their respective parties, are in, or have ever been in, anything like a world conspiracy or a world confederation to achieve certain ends about which both were also agreed.

The authors of this book, nevertheless, do at this time stress the following points: Whether the international socialist movement of Major Attlee and of Josef Stalin are one movement or two movements either movement or both movements, as the case may be, must be said to have won the war; and we further say that no movement or ism comparable or similar to international socialism, and no ism which by any stretch of the imagination can be called American, has won the war at the date of writing this book. German Nazism and Italian Fascism may be said to have lost the war. Russian or international commnuism may be said to have won the war. But international capitalism has certainly not won the war, nor has the American way won the war. That much is certain. We say all this by way of pointing up the general proposition that Dennis' publicly announced views about Fascism, communism, American destiny and policy in no way warranted calling him a Fascist or a Nazi or linking him in a criminal trial in wartime with the foreign enemy of his native land.

Dennis' military and civic record speaks for itself. In 1915 he paid his way to attend the very first citizens military training camp ever held, that at Plattsburg, N. Y. That was an early indication of his sentiments as to preparedness and a citizen's duty to his country or, if you will, his Americanism. In April, 1917 he went back to Plattsburg with the first contingent of volunteers for the first officers' training camp, from which he received a commission in August, 1917. He was not drafted in 1917 when he was of military age. He volunteered again in 1942 when he was past military age. Yet Biddle and Rogge said he was in a world conspiracy to cause insubordination in the armed forces.

In World War I Dennis served two years, over a year of which was spent in France, as a lieutenant of infantry. He was honorably discharged in August, 1919. Thereafter, for seven years he served as a career officer of the United States diplomatic service, acting at times as American charge d'affaires in Rumania, Honduras and Nicaragua. He resigned from the diplomatic service to enter international banking in 1927 when he was highly praised by the then Secretary of State Kellogg for his service under the State Department.

Right after Pearl Harbor Dennis offered his services in any capacity both to the State and War Department, under both of which he had served his country as a commissioned officer. He was then forty-eight years old, well over the draft age or the enlistment age. The War Department called Dennis up for a physical examination, directing him to apply for a commission in the Military Police Corps. When the New York newspaper PM learned that the War Department was going to offer Dennis a captain's commission, presumably on the strength of his war record and general qualifications, the people behind the Trial started a press campaign to stop his commission. These papers urged their readers to write their Congressmen protesting against Dennis' being allowed to serve his country in wartime in the armed forces. Naturally, the people who had enough pull with the White House to start the Sedition Trial were able to stop Dennis' commission. We leave it to the reader whether this is the record of a traitor to his country or of a man who would have conspired to cause insubordination in the armed forces. And all this seems to the authors to come under the heading of fair play.

The authors do not attempt to pass on the question whether any defendant ever merited being called a red-baiter or a Jew-baiter or a Fascist or a Nazi. The authors in this connection limit themselves to the observation that the people who complained of red-baiting did identically the same thing, Fascist-baiting, to these defendants.

Fascist-baiting is in every way identical with red-baiting. The big argument against red-baiting was the fact that many, if not most, of the people called reds by the so-called red-baiters were neither members of the Communist party nor subscribers to all its teachings. Similarly, the case, on the ground of fair play, against the Fascist-baiters, is that most of the people called by the Fascist-baiters Fascists, including most, if not all, of the defendants were not members of any party called Fascist, Nazi or any like name and were not subscribers to all the teachings of either the Italian Fascist or the German Nazi party. Of course, it would be impossible to find any one nowadays who does not subscribe to many of the teachings, either of the Nazis or the Communists. The methods by which certain defendants were made to appear Fascists or Nazis were identically the same methods the people behind the Trial had complained of as having been used to make them out to be communists and minions of Moscow.

About all that differentiates the Fascist-baiter from the red-baiter is the fact that the Fascist-baiter got the Department of Justice and the lower federal courts to put on a political propaganda trial that will go down in history as a farce, a travesty on justice and a blot on the federal administration of justice. If red-baiting was wrong, Fascist-baiting is no less a wrong. And two wrongs do not make one right. Red-baiting, like Fascist-baiting, is unfair and a social evil. But neither species of unfairness in political debate is either illegal or practically preventable. It is when the Department of Justice goes in for

Fascist-baiting or red-baiting that true Americans must hang their heads in shame and blush for the fair name of our federal judiciary. The result is bound to be the national scandal that *The Saturday Evening Post* admirably pointed out and excoriated in its editorial of January 6, 1945, headed "LET THIS BE OUR LAST MASS TRIAL"!

In the course of the Trial there were too many examples of unfairness to be listed and discussed in one book. We merely cite a few selected examples. In the matter of attorneys, for example, the Court changed attorneys during the trial and forced on defendants attorneys not of their own free choice in a way to deprive these defendants of a proper defense. It is obvious that a lawyer brought into a trial of this nature several weeks or months after its beginning can never catch up on the evidence and argument already in and conduct a proper defense for his client.

The defendant Smythe, for instance, along with defendant Noble, had Attorney James J. Laughlin. When Laughlin was barred from the case, Smythe was given M. Edward Buckley. Noble, who was given the same attorney, was severed on his repeated repudiation in open court of the court-appointed attorney to represent him. Smythe should have been severed from the case on the exclusion of his attorney.

Colonel Sanctuary (this defendant had risen in the last war to the rank of lieutenant colonel) began with Attorney Henry H. Klein of New York. Rather than sever Sanctuary, the judge insisted on appointing for his defense Marvin K. Bischoff, who had only been in the Trial a couple of weeks as counsel for Elmer J. Garner, an octogenarian who died in his sleep before the jury had been chosen. Klein withdrew from the case after two and a half months, alleging fear as his reason. Possibly his allegation may have had some basis. Attorneys St.George and Little, driving home one evening around nine o'clock, had a shot fired at them which passed through the windshield of their car in line with their heads. Attorney Powers complained that he had been set upon by five Jewish thugs in Chicago and so severely beaten that he was laid up for four days in the hospital. Attorney St.George was so persecuted for his defense of his client McWilliams that he lost a twelve year law association and was held up for a time from moving into a new office.

A few days after Klein's retirement from the case Judge Eicher issued a bench warrant for his arrest for contempt of court and caused proceedings to be instituted in New York City for Klein's removal to Washington. After a three months' fight to prevent his removal, Klein was brought back in handcuffs into Judge Eicher's court on September 28th. The next day the judge quickly found Klein guilty of contempt for having withdrawn without the court's permission and sentenced him to jail for ninety days, with the strange provision that after Klein had served a week in the District jail, the rest of his sentence would be remitted, if he came back into the case. Imagine a lawyer making a proper defense of a client before a judge holding him under this sort of duress! His attorney, James J. Laughlin, the same Laughlin whom the judge had barred from the Sedition Case, noted an appeal and asked a reasonable bond for Klein, advising the court that in New York Klein had been out on his own recognizance during the removal proceedings. The judge, however, ordered Klein to jail and set the bond at $10,000 which Klein, of course, could not raise in the late afternoon in a city that was not his home. The next day Laughlin had no difficulty with the Appellate judge in getting Klein's appeal bond set in a reasonable amount, namely $1,500. Klein left the same day for New York and never returned to the Trial. Later the Appeals Court naturally reversed Judge Eicher's sentence.

During all this time and to the date of his death, the trial judge compelled Sanctuary to allow the court-appointed lawyer for him to represent him—much to that lawyer's embarrassment who frequently made mild protests that he was not representing his client with his client's consent or cooperation.

W. Hobart Little, attorney for David Baxter who was severed on account of deafness, was thereafter appointed attorney for Ernest Elmhurst. Some time later, on October 4, 1944, Little was allowed to withdraw from the case. His new defendant, however, was not severed; he was forced to accept counsel entirely new to the case: Orville Gaudette and John S. Hillyard who, from then on, appeared alternately for him. Thus at least four defendants were defended by different attorneys who did not represent them throughout the trial.

Further, under the heading of fair play, there remains to be mentioned a peculiarly loathsome species of unfairness practised against the defendants by the people behind the Trial. This type of unfairness consisted of the most elementary kind of common law conspiracy to injure a third party by depriving him of an opportunity to earn an honest living. Defendant McWilliams was not only an orator, as charged by Rogge in his opening statement, but, also, an inventor and an industrial engineer who earned and was capable of earning from one hundred to one hundred and fifty dollars a day. During the Trial he secured employment in his capacity of industrial engineer with a large industrial concern in Chicago. He had been working satisfactorily about ten weeks on this job, which promised to last a year at least, when suddenly *The Chicago Sun* came out with a blast that this ''Nazi'' was receiving employment by a firm engaged in war work. One would suppose that any employment would be considered useful to the war effort, especially if worthy of a high wage. The people behind the Trial, however, have consistently agitated to have any defendant dismissed as soon as they learned of his employment. Just how this enforced idleness of defendants during wartime could be more helpful to the war effort than their employment is something only the type of mind of those behind the Trial can understand. After *The Chicago Sun* blast, the Jewish Chicago Action Council and other Jewish organizations swung into action on McWilliams' job.

For a time it seemed as if McWilliams' employer would be able to resist the pressure. Then, unexpectedly, a run was started on a west side bank of which the president of the firm employing McWilliams was chairman of the board. He was able to stand the bank run only two days. Then he had to wilt and dismiss McWilliams. In these two bank business days certain depositors who were behind the Sedition Trial withdrew deposits to the tune of over six million dollars.

Such a conspiracy to keep a man from earning a living runs directly counter both to special federal laws and to the common law. Yet this sort of persecution still pursues all the defendants in the Sedition Trial.

Another defendant, Elmhurst, whose chief crime seems to have been the writing of a book entitled *The World*

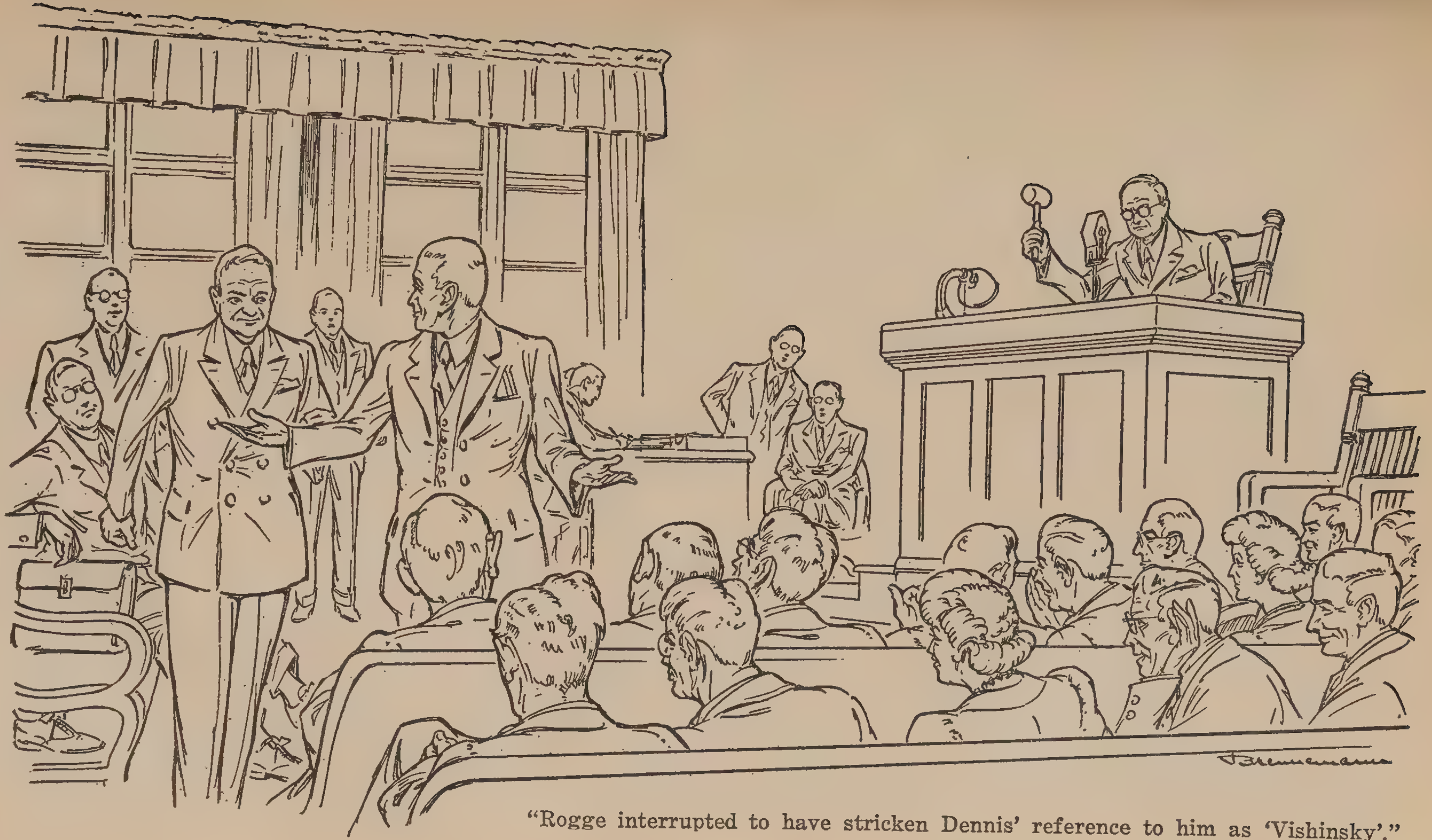
Hoax, an anti-communist tract, would no sooner get a job, even as a humble waiter, than Walter Winchell would find out about it and make the matter of this defendant's having got a job as a head waiter in a Washington hotel the subject of a hysterical mention in his weekly broadcast to the nation, with the result that Washington, which sorely needed waiters, lost the services of a good one and the cause of Walter Winchell chalked up another triumph.

That is precisely the sort of thing that the Jews and other minority groups behind the Trial have complained of as a consequence of anti-Semitism and red-baiting. Having got a vote-minded Washington administration to put on the Trial to please them, at the cost of the prestige of the Washington courts and the life of a judge, these people behind the Trial have not been content to let the Trial settle their score with the defendants. They have, all during and since the Trial, by biased and prejudiced comments in the press and over the radio and by a nation-wide conspiracy to prevent any one of the defendants from earning an honest living, persecuted the defendants and deprived them of their civil rights.

Under the heading of fair play, we may mention a comparatively minor but thoroughly typical incident of the Trial. During Rogge's opening he was frequently interrupted at the outset by defense objections. He then proposed to the Court that he be allowed to proceed without interruption, each defense lawyer making note of all his objections and bringing them up after Rogge had finished. The Trial judge readily assented to this proposition in the following statement (page 1808 of the Record):

> The Court: That will be the order of the Court. The Court will recognize no counsel while Mr. Rogge is speaking nor will the Court recognize Mr. Rogge when defense counsel are speaking.

During defendant Dennis' opening, which followed that of Rogge, the latter interrupted him at least twice with objections, which the Court sustained, granting Rogge's motion to strike Dennis' reference to Rogge as ''Vishinsky.'' Vishinsky was the Soviet prosecutor who gained fame through the Moscow purge trials. Dennis later asked that the court record show that the judge had bro-



“Rogge interrupted to have stricken Dennis’ reference to him as ‘Vishinsky’.”

ken his word by recognizing Rogge when defense counsel were speaking. The judge took no judicial notice of Dennis' charge. Dennis would have welcomed a contempt citation and fine on this charge. It would have enabled him to prove on appeal that the judge had broken his promise. Dennis had also pointed out that if it was fair for Rogge to call him a "Rosenberg," it was surely fair for Dennis to call Rogge a "Vishinsky."

Under the heading of "Fair Play" we regret to have to indict the F.B.I. along with Rogge, Biddle, and the Department of Justice for having shown during the war a conspicuous lack of due respect for freedom of speech and civil liberties. The record of the F.B.I. in this respect speaks for itself.

A leading editorial in *The New York Herald Tribune* of August 12, 1945 entitled "Suspicion Justified" fully ventilated the abuse of criminal law enforcement by the Department of Justice and F.B.I. in connection with the arrest on a trumped up charge of a number of persons in the spring of 1945. *The Herald Tribune* observed that suspicion had been aroused that the criminal law was being used for political purposes when it came out that three government employees and three newspaper writers had been arrested for conspiracy to steal secret government documents. A Federal Grand Jury in Washington, after hearing the evidence, had returned no indictment against three of the six. It had turned out that there was insufficient evidence against the three to sustain the charge.

The Herald Tribune editorial called attention to the fact that all six of those arrested had been critics of American policies in the Far East, and that several of them had high reputations as journalists, public officials and writers. One of them, John S. Service, had been commended and promoted for his work in the American Foreign Service in China.

The New York Herald Tribune remarked that "It is not so pleasant, however, to consider the status of the F.B.I. and the State Department in the affair." It asked why, if the evidence was so weak that a Grand Jury would not indict, a distinguished public servant like Mr. Service was arrested. Later, then Assistant Secretary of State Joseph Grew publicly ate humble pie in a letter to John Service reinstating him in the Foreign Service and expressing satisfaction that he had been vindicated by the Grand Jury. One wonders why Grew and J. Edgar Hoover did not investigate and get their facts straight before arresting Service instead of after.

Now it so happens, thanks to J. Edgar Hoover's flair for self-advertising and to the assistance he gets from press agents like Walter Winchell, that the American public has been conditioned to think of the F.B.I. not only as an efficient instrumentality of crime detection and prevention, which it is, but also as an agency conducted with a scrupulous regard for civil liberties and free speech, which it is not. The F.B.I. has shown itself repeatedly the willing tool of partizan politics, publicity seeking direction and a pandering to war hysteria against certain minorities.

In the case which is the subject of the above mentioned editorial rebuke to the F.B.I. by *The New York Herald Tribune,* the F.B.I. had once again crashed the front page headlines of the nation with a lurid, penny dreadful story of its sensational arrest of six alleged betrayers and thieves of State Department secrets, one being a career officer of the State Department, to whom Assistant Secretary Grew later wrote a letter of apologetic reinstatement. The authors of this book have no interest in or sympathy with the views of these six critics of State Department policy in the Orient against whom J. Edgar Hoover staged a front page arrest. But the conduct of the F.B.I. in this case invites the censure of all right minded citizens who believe in free speech and civil liberties for leftists as well as rightists and for critics as well as supporters of the Administration's policies. We believe in one law and a single standard for all.

One of the defendants in the Sedition Trial was the victim of an arrest without probable cause or proper investigation, exactly as were the three persons mentioned in the above cited editorial of *The New York Herald Tribune.* Joseph E. McWilliams, whom one of the authors of this book defended in the Trial, was shown on the front page in a full page photograph in both New York tabloid dailies being led away in handcuffs by F.B.I. agents on an arrest over a year before the Sedition Trial started. McWilliams had been thus sensationally arrested by the F.B.I. with their usual bid for cheap publicity in such cases on a technical charge of failing to notify his draft board of his change of address. As soon as the draft board in question could be reached, the charge had to be dismissed and McWilliams released. The draft board had to say that there never had been the slightest basis for the arrest. The arrest, however, got that meed of cheap publicity which the F.B.I. seems ever in quest of where politics are involved, while the story of the dropping of the charge got no publicity. The people behind the Sedition Trial, whom the head of the F.B.I. has conspicuously cultivated and sought to curry favor with, got the satisfaction of seeing McWilliams in handcuffs on the front page. This unwarranted arrest, made for them by the F.B.I. had given them the same gratification the staging of the Sedition Trial afforded them.

This sort of publicity seeking by the F.B.I. through a sensational arrest, whether against John Service of the State Department or Joseph E. McWilliams, in either case without probable cause or proper investigation, is to be deplored. The F.B.I. should stick to its proper functions which are the detection and prevention of crime. It should not be used as an instrument of politics, political minorities and publicity seeking by its director. When defendant Dennis was arrested on his Massachusetts farm, following the indictment of January 4, 1945 in the Sedition case, the local newspaper, the *Berkshire Eagle* of Pittsfield, asked him for a statement which he readily gave, roundly denouncing his arrest and the entire indictment as a reprehensible political maneuver on the part of Washington. This newspaper, which is notoriously under the influence of the people behind the Trial, editorialized at length on Dennis' statement, warning its readers that a case on which the F.B.I. had worked was not to be lightly dismissed as politics.

The fact is that if the F.B.I. is prominently associated with the framing of a political prosecution or the pulling of a front page arrest for publicity purposes, it only proves that the F.B.I. is being used as the tool of politicians, minority pressure groups or its director's inordinate appetite for publicity. It is high time for the American people to learn that the F.B.I. is not a semi-judicial agency and that it is a tool of politicians in Washington, certain minority pressure groups and the love of publicity of its director. When the F.B.I. sticks to its proper law enforcement function, it is an efficient and praiseworthy government agency. When it allows itself to be used as the tool of the interests just named, it is a public menace.

The F.B.I. has gone out of its way to sell the American people the notion that one of its functions is to protect the American people against subversive ideas, groups and activities. This is an idea that every enlightened and right-minded citizen will stoutly oppose. Such a notion is appropriate to a totalitarian, police state, dictatorship and not to America. The good sense of the American people should be their only protection against political ideas, doctrines or propaganda. Even if it were a part of our theory of government to have a governmental agency shield the American people from dangerous political ideas, J. Edgar Hoover and the F.B.I. personnel would not be the right people to undertake such a task. Most of the F.B.I. personnel are nice, clean-cut young men with a night school law training or its equivalent who lack the cultural background and other qualities to aspire to success in the private practice of law or one of the professions. These healthy, physically sound, class A, young men make excellent bureaucrats, government clerks, policemen, government detectives and errand boys for the Department of Justice, but they have no qualifications for the exercise of judicial discretion or political control functions. The exercise of censorship or political control functions has no place under our system. But if it did have, it should be entrusted to young men of higher calibre than any police corps can ever possibly obtain.

As for activities that are called subversive, the rule of common sense, of law and of our traditions and institutions is clear: if any person is prepared to swear out a complaint against another person or group charging some specified type of unlawful activity, the F.B.I. may properly investigate that complaint and make suitable recommendations on the basis of its findings of fact. But the F.B.I., no more than the local chief of police or district attorney of any city, town or county, has any business wasting public money and the time of highly paid agents making fishing expeditions into the private affairs and activities of individuals and lawfully constituted organizations to check on irresponsible, unsworn and general tips, rumors or requests by individuals or groups, which charge the commission of no specific crime but merely allege generalities such as that the person or group they want investigated is ''un-American,'' ''subversive,'' ''anti-Semitic,'' or something else bad. As matters now stand, there is reason to believe that the F.B.I. welcomes any excuse to investigate that will furnish a pretext for getting more money and more agents for the Bureau. The more people the F.B.I. has to investigate, the more agents it needs to do the investigating. The bigger the organization, the greater the importance, glory and power of the Director.

An expensive investigation by the F.B.I. is not something to be lightly undertaken. It is not something to be done on the general theory, ''When in doubt, investigate.'' The fact of the matter is that the authorities must always be in doubt about any rumor or allegation about any citizen. An organization that tries to investigate every rumor or complaint is bound to become a waster of public funds and a besmircher of private reputations. The making of the investigation is a form of persecution and injustice if it is not subsequently justified by a conviction or judgment in the public interest. The F.B.I. probably is run on the theory that it is useful to the politicians in Washington to have a complete file on the facts of the private lives and affairs of every one of importance. The more the Washington commissars know about the private lives and affairs of potential critics, the less they need fear them. It's a good theory for a self-perpetuating bureaucracy and a dictatorship. But it is as un-American as the totalitarian slave state.

It quickly becomes known that F.B.I. agents are ringing doorbells and asking certain questions about any person or persons under investigation. It suggests certain inferences and conclusions. It is highly efficient rumor spreading by government agents. What, ordinarily, only idle and vicious gossips do on their own time, expensive government agents do on government time. It is easy, of course, to rationalize such investigation as a measure of precaution. All the agents are after are the facts. The government is entitled to all the facts about everybody that it can get. (But is it? Justice Brandeis in a learned legal opinion once rightly declared that one of the most cherished rights of every American citizen was the right to privacy). It should be readily apparent to every one that all rumors or reports cannot and should not be investigated. The irresponsible or vicious can file such reports or rumors with the F.B.I. with impunity, since, in so doing, they run no risk, incur no liability and assume no responsibility, as any one does who files a sworn complaint which becomes the basis of some action by the authorities. It is a characteristic practise in police states and dictatorships like Russia and Nazi Germany that the secret police, corresponding to the F.B.I., welcomes and investigates all denunciations and reports about persons said to be dangerous to the regime. It is a characteristic feature of a free society that the authorities tell people with such tales about others to sign and swear to a specific complaint or run along about their business. It is an unfortunate but understandable vice of our F.B.I. that it has been encouraging the growth of this characteristic practise of the foreign slave states right here in America. It is time for a stop to be put to this sort of thing.

Aside from the consideration of fair play for persons who may be made the subjects of F.B.I. investigations and arrests without cause on the instigation of minority groups or individuals against whom they have no legal recourse, there is the larger consideration of public interest in connection with a practise that gives to our America the atmosphere of a police, slave state and that constitutes a continuous intimidation against freedom of speech and freedom of the press. The fact that a given person may be perfectly innocent of any wrong doing does not make him secure against intimidation by investigation or improper arrest, indictment and trial. The arrest, detention and accompanying publicity to which the F.B.I. subjected either John Service of the Foreign Service or Joseph E. McWilliams, all without probable cause or proper investigation, have as much intimidating effect on people of good standing as a long jail sentence might have on many obscure persons.

The fact that a person who is exposed to some sort of ordeal by the F.B.I. or the Department of Justice is either eventually cleared, whether by the Grand Jury refusing to indict, the petty jury acquitting, the judge directing a verdict, a higher court reversing a conviction, or the judge dying during the trial and the Department of Justice failing to re-try the case, does not mean that such a person has had a square deal. False arrest, trial on an improper charge or case or even just prolonged investigation by the F.B.I. may be a lot worse for a given indivdual than serving a year's jail sentence is for most convicts. The victim of these types of special Department of Justice or F.B.I. persecution is not compensated by the fact of eventual vindication, whatever form it may take. Vindication does not recoup his financial losses, or undo the harm the ordeal may have caused him in the matters of mental, physical or moral health, of reputation, or in innumerable material and spiritual ways. The Sedition Trial was for some defendants an ordeal which, at the time of writing this book, had been going on for nearly four years. Such an ordeal is as real a punishment for most people as a jail sentence.

Coming back to the last point we stressed in this connection, the point of public interest in F.B.I. abuses of its power and facilities, we may summarize as follows: if it is generally known that critics of the government, of certain policies or of certain minorities are exposed to ordeals such as the Sedition Trial, the unwarranted arrests by the F.B.I. of men like John Service of the State Department or Joseph McWilliams, and prolonged investigations, if they do not keep their mouths shut or yield to certain pressures by certain minorities, then there is just as much intimidation against a lawful exercise of freedom of speech and the press as there is against such unlawful practises as driving to public danger or committing a public nuisance for which people are daily fined and jailed. A hundred dollar fine or a ninety days jail sentence for speeding is nothing as compared with the ordeal to which most of the free speech victims of the Department of Justice and the F.B.I. have been subjected in this war, even those victims who have won complete vindication.

In concluding this chapter, the authors make it plain that they do not hold the F.B.I. responsible for the Sedition Trial. The trouble with the F.B.I. in connection with free speech cases is its lack of responsibility. It is just a tool of given political interests and minority pressure groups. It can be properly used for the detection and prevention of crime. It can be improperly used as a tool of politics and minority groups or of the simple craving of its director for front page publicity. The tool is not to be blamed for its abuse. The subordinate personnel of the F.B.I. working on these political and free speech cases do not really know or understand what they are doing or why they are doing it. They are simply ringing doorbells, asking questions and collecting facts or statements pursuant to detailed and specific instructions for which they have no responsibility and of the cause behind which instructions they have no understanding. They are well-meaning, conscientious tools of policies and interests for which they have no responsibility and of which they have usually no understanding. The F.B.I., like the atomic bomb and so many other useful and dangerous tools, is an instrument around the use of which new safeguards against abuse by unscrupulous interests must soon be created. To the preparation of such safeguards, the authors hope this chapter and this entire book will have made some useful contributions.

CHAPTER XXI.

END ABUSE OF THE CONSPIRACY CHARGE.

The purpose of this chapter is neither to theorize about nor instruct on federal conspiracy law, which is in a state of considerable uncertainty and confusion. On the state of the law as to criminal conspiracy Professor Sayre had to say (35 Harvard Law Review 393): "A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought." The purpose here is briefly to call attention to the dangers and evils of abuse of conspiracy law and practice in the federal courts in politically motivated and politically drawn criminal indictments. The central idea of this chapter may be stated summarily at the outset. It has been developed in various connections throughout the entire book. The idea is that the public interest does not require the mixing of non-criminal political utterances, writings, activities or doctrines in a charge of criminal conspiracy. If it is charged that these political utterances and activities are criminal, then, of course, let them be put in evidence as parts of the corpus delicti. But if they are not, let them be kept out as irrelevant to the criminal charge being tried. Thus, if the charge is causing or conspiring to cause insubordination, the only political utterances or activities admissable are clearly those that relate directly to that particular crime. It is not relevant to introduce evidence that the accused said some perfectly lawful things which somebody else, somewhere else, said who also caused or tried to cause insubordination.

The carrying out of this idea in political conspiracy cases would mean that whenever a prosecutor started offering evidence to show similarities or links between the defendants in their perfectly lawful political expressions of opinion or activities, the judge would cut him short with a question or observation in this tenor:

In a trial of a group of Negroes, Jews, Methodists, Free Masons or Republicans on a charge of criminal conspiracy, the court would not allow you to introduce evidence merely tending to show racial, religious, fraternal or political affiliations between the defendants. Such links are not criminal and cannot be relevant to a criminal charge. The court, in this case, will not allow you to present evidence merely tending to link these defendants in perfectly lawful political, racial or religious connections by way of establishing a presumption or suggesting an inference that they were linked in the criminal purpose you are charging and trying to prove. Let us have some evidence linking the defendants in criminal intent or let us have an end of the case.

Had the judge in the Sedition Trial taken such a position, the Trial would have been over in a week instead of ending as it did, after seven and a half months, in the death of the judge. Defense lawyers continuously begged him to take such a position all during the Trial. There was no more reason to bring out in a charge of conspiracy to cause military insubordination the facts that most of the defendants were anti-Semites, isolationists or anti-communists than there would have been in a trial of a group of New York City contractors on a charge of conspiring to defraud the city to bring out the facts that the defendants were all Irish or Jews and had always voted the Democratic ticket.

Nine-tenths of the prosecutor's task in any conspiracy case consists in creating in the minds of the jury an impression that all the defendants are linked with each other. The conspiracy charged is usually taken for granted both by defense lawyers and the jury. This linking of the defendants should be done only in terms of criminal intent to join and further the specific conspiracy charged. If the defendants can be and are linked by evidence and argument otherwise than in criminal intent, there is an obvious abuse and there is likely to be a gross miscarriage of justice, which a higher court may have to rectify months or years later after innocent persons have been unjustly punished.

It is easy to pick a group of one's political enemies or of one's business rivals who can be readily linked with each other by certain legitimate ties, associations, contacts and common interests. If, as usually is possible, one can enlarge this pattern of legitimate links to embrace some evil doers having a criminal purpose in common, one can make up a perfect conspiracy charge on the Rogge formula. In Rogge's conspiracy, the evil-doers were the Nazis. His whole problem was to convict the defendants by linking them with the Nazis.

In tricky conspiracy charges, all the accused are easily linked by legitimate associations or ties and some of the accused are shown to have links of common criminal intent, the basis of the charge. The lawful and unlawful links of purpose are thus blended, and the good are convicted along with the bad because the good had some lawful links with the bad. In politics, as in most types of large scale business, it is impossible, as a practical matter, for the good to avoid links or ties or association and collaboration with the bad. Nearly all the biggest American financial and industrial concerns had such links with Axis Germany, Italy and Japan, a fact which the leftist press uses to needle the Department of Justice into bringing tricky conspiracy charges based on such ties. In politics, as in big business, a major participant cannot avoid receiving the support and votes of bad people who support him with evil motives.

The importance of the potentialities of the abuse of the law enforcement function by a politically motivated Department of Justice rigging political conspiracy charges at the behest of certain minorities cannot be exaggerated. The abuse is more sinister by reason of its effects on liberty and freedom of speech and political opposition than by reason of the injustice, great as this undoubtedly is, done to individuals chosen as examples for prosecution.

The political conspiracy formula for framing innocent people may be stated in terms of mathematical symbols somewhat as follows:

> A, B and C are honest people linked by lawful intent in some common enterprise of business or politics. This intent we will call.................................M
>
> X, Y and Z are rascals all linked by a common criminal intent we will call.................................N
>
> But all six, or A, B, C, X, Y, and Z are also linked by intent ....M

So, to prove them all guilty of a criminal conspiracy, the government links them all by M and proves that some of them have the criminal intent N. The government then asks the jury to conclude that A, B and C knew about and shared criminal intent N of X, Y and Z because A, B, and C worked with X, Y and Z with intent M.

In the Sedition Trial the people with the bad intent N were the Nazis who were not put on trial but were named as co-conspirators by Rogge in the indictment and bill of particulars and throughout his opening statement. The Nazis were supposed to have had the evil intent of wanting to cause insubordination among the armed forces, while the defendants were supposed to be linked with the Nazis by reason of the fact that both the Nazis and the defendants favored an isolationist policy for America, were against the communists and said uncomplimentary things about the Jews.

Having in mind the formula just explained, let the reader use his own knowledge of local political conditions wherever he resides and a little imagination to conjecture what any unscrupulous politician in power or any misguided fanatic with access to the enforcement machinery of the law can do in the way of rigging a slick conspiracy charge against political adversaries. Assume it is desired to frame a given number of honest politicians, officeholders, candidates or persons merely active in politics. There is no evidence on which to hang a charge against this group. But they can all be linked with a bunch of crooks or grafters who worked with and for them in a political campaign for selfish reasons and with unlawful ends in view. It is impossible to link by evidence all these people in criminal intent, but very easy to link them in lawful political intent. So the prosecutor proves the link of good intent of all and the link of bad intent of some and asks the jury to conclude that all knew of and shared the bad intent of some.

In such a frame-up everything is likely to depend on what the judge admits in evidence and how he instructs the jury. The only issue of fact is whether the honest men cooperating with rascals in a political campaign knew of and shared the unlawful designs of such rascals in working for the given cause. If the judge takes the view that the prosecutor has a right to try to get convictions on such misuse of evidence and logic, the only hope of the defense for winning an acquittal from the jury is to show, against the judge's best efforts to prevent it, that such a prosecuion case is unfair and reprehensible.

Supose a high-minded President of the United States and equally upright members of his Administration, after they went out of office, were indicted along with the crooked mayor of a large eastern city who had long headed a notoriously corrupt city political machine which regularly delivered the entire state electoral vote to the high minded President in return for federal patronage from the same President. Suppose the charge is conspiring to violate the electoral laws of the state of the crooked mayor and to graft in general. The honorable President and the crooked mayor can easily be shown to have been linked over a long period of years in the closest ties of political partnership. The evidence of this is conclusive. Then the jury is asked to conclude from this partnership that the honorable President must have known that his political partner, the crooked mayor, was a rascal since everybody else knew it and since the evidence of the mayor's crookedness was also conclusive.

The above is neither academic nor far-fetched. Politics is of such a nature that the rules of conspiracy law developed by the courts to get bootleggers, white slavers, dope peddlers and racketeers cannot be applied to participants in the political game without jeopardizing political freedom. This is not to say that any one in politics should enjoy immunity from prosecution for criminal conspiracy. It is only to say that proof of the charge must not include evidence of legitimate political links between any of the accused. It is to say that politics should be kept out of evidence as being irrelevant to criminal intent.

In the fields of political thinking, writing, speaking, debate and advocacy, the principle upheld in this chapter is far from academic. How can a person who upholds a given idea, thesis or cause in public debate over a policy or issue, domestic or foreign, be responsible for the motives, interests or acts of the people, groups or even foreign nations who or which may find aid and comfort in what he has to say? The people behind the Trial have repeatedly and publicly asserted the dangerous and fallacious doctrine that any utterance which served Nazi interests or purposes at any time or in any phase is tainted with Nazi interests and motivations, hence with all the crimes of the Nazis. On this theory, any one who now or in the future talks against our ever going to war with Russia might at some later date when we were at war with Russia be accused of having been a Russian agent or co-conspirator to impair the loyalty of our armed forces to their commander in chief. It is easy for a prosecutor to argue that denouncing a President's foreign policy is disloyal or that advocating changes in our institutions is showing disloyalty to them.

Of course, if the federal judges over half of whom are now appointees of the late President Roosevelt, all but four of over two hundred such appointees being members of that President's political party, were to bear in mind the principles laid down in the court's ruling in Kassin v. U.S. 87 Fed. (2) 183, at 184, they would probably not admit any of the irrelevant evidence discussed in this book:

> Widespread and damaging as is a charge of conspiracy, difficult as it is for one caught in the net of such a charge to extricate himself from it when the government has any evidence tending to connect him with it, such a charge, no less than charges of substantive offenses, requires proof. In each case, however, links in the chain must be clearly proved, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inference which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.

Already, back in 1925, the practice of federal prosecutors blindly to throw everything into a bag and shake out a conspiracy met with severe criticism from the then Chief Justice of the United States Supreme Court and the Circuit Court judges. At a judicial conference held in 1925 under the Act of September 14, 1922 (42 Statute 837) the Chief Justice and the senior Circuit Court judges in their recommendations to the district judges made this statement:

> The theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further, the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant.

The authors of this book earnestly recommend that a committee of the Bar Association be appointed to make a thorough study of the whole problem posed in this chapter in particular and throughout this book in general as to the political use of the conspiracy charge in response to minority group pressures. Such a committee should draft recommendations for far reaching federal legislation to reform current practices and curb future abuses of judicial discretion as to the admission of evidence and the triability of certain types of prosecution theses in conspiracy cases. The essence of the problem is that conspiracy law is mainly court-made—the result of a long line of decisions—and that the crying evil to be corrected is that of allowing evidence merely showing legitimate links in political ways to be introduced to create the impression that the criminal ties charged also existed.

To those who would interpose the objection that we must trust to the discretion of our federal judges in the matter of the admissibility of evidence, the authors again point to the five Supreme Court reversals of the lower courts on evidence in civil liberties cases during this war. The authors further call attention to the fact that the labor unions have already got Congress to legislate definite curbs on the common law powers and discretion of the courts to interfere with labor union activities. Freedom of speech and political association are more important than the rights of labor unions. These freedoms must be kept secure against intimidation through political uses of the conspiracy charge to convict the good along with the bad on a showing, not of criminal acts, but merely that the good and the bad had a common political or propaganda link or partnership.

As already stated, the essence of the government's case in the Sedition Trial was an attempt to use isolationism, anti-Semitism and anti-communism to link the defendants with the Nazis and to have the jury infer from such ideological and propaganda similarities an unprovable link in criminal intent between the Nazis and the defendants to cause insubordination in the armed forces. Similarity of propaganda content does not prove or even necessarily support the presumption of a similarity of intent in the making of such propaganda. As the Supreme Court laid down in the Bridges case, limited political partnerships for limited and lawful purposes do not constitute proof of partnership for unlawful purposes. It is necessary to prevent errors in the exercise of judicial discretion by the lower courts as to the admissibility of evidence in political conspiracy cases and not leave the rectification of such errors and injustices to the Supreme Court.

Freedom of speech is the corner stone of our liberties. Our Supreme Court has recently been a bulwark of this freedom. From its very beginning the Supreme Court has been a jealous guardian of free speech. Its decisions are replete with eloquent and vigorous tributes to this freedom, none more eloquent than the concluding paragraph of Justice Rutledge's opinion in the case of Thomas v. Collins, decided by that Court on January 8, 1945 (89 Lawyers Edition No. 6, page 340):

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.

“I do solemnly swear that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.”

FIRST AMENDMENT TO THE CONSTITUTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.”

FOURTEENTH AMENDMENT TO THE CONSTITUTION

“***Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

“Freedom of speech is the corner stone of our liberties. It is a national right federally guaranteed—which no state, nor all together, nor the nation itself, can prohibit, restrain or impede.”

WITH LIBERTY AND JUSTICE FOR ALL

Conclusion

CHAPTER XXII.

CONCLUSION.

The Mass Sedition Trial of 1944 has taken its place in history. But the final disposition of the case by the courts, either on the motion of the Department of Justice or of any of the defense attorneys, had not been made by the time this book went to press, about the last of November, 1945. The normal, the proper and the only decent thing under the circumstances for the Department of Justice to have done within a reasonable length of time—certainly within three months—after the declaration of the mistrial on December 7, 1944, was either (1) to ask the Washington court having jurisdiction of the case to set a date for a new trial, or (2) to move to dismiss the indictment. Instead of taking either one of these two courses, the Department of Justice over a period of practically a year just stalled.

During this long period various Department of Justice spokesmen told the press, defense counsel and others that the case was not closed; that the Department was trying to get evidence from Germany; that a new trial brief was in preparation by the project director Rogge; and that, for the time being, the Department of Justice had no announcement to make about setting a date for a new trial.

In the early spring of 1945 the columnist Drew Pearson announced that the Department of Justice had asked Washington criminal law expert William Leahy to take over the case from project director Rogge. Rumor about Washington, especially in legal circles, had it that Leahy, after going over the indictment and the court record, declined to take over the white elephant, even to save the somewhat lost face of the Department of Justice. Another rumor had it that Attorney General Biddle, before being replaced by Tom Clark, had picked a "hanging" judge from outside Washington to put over the Sedition Trial, but that the local District of Columbia bench would not "cooperate" with the Department of Justice to the required extent of inviting in the outside "hanging" judge handpicked by Biddle for this "job."

It was the general consensus of the Washington lawyers and informed opinion about town all through 1945 that the judges of the District of Columbia federal bench were most anxious to avoid a repetition of the farce that had brought their courts into so much ridicule and discredit over a seven and a half months period in 1944. The Washington bench might have felt itself unable to prevent the Department of Justice from starting up the Sedition Trial again, the late Chief Justice Eicher having overruled demurrers to, and motions to quash the indictment and having allowed the Trial to run for seven and a half months until his death. But any new judge assigned to the case might have stopped the farce in short order by calling on the prosecutor to present competent and relevant evidence to meet the standards of the five Supreme Court decisions heretofore quoted and not the ''trash'' introduced by Rogge during the seven and a half months of the Trial.

The Department of Justice must have known all through 1945, following the mistrial declared on December 7, 1944 that, in order to have another chance to present the case analyzed in the preceding pages, it would need a handpicked judge, one who would take the position that the government was entitled to all the time and lee-way it might take to try to make out any kind of a case with whatever kind of evidence it might have for this purpose. The limits of judicial discretion are extremely broad. Possibly a trial judge has discretion to allow a prosecutor to try to prove that the moon is made of green cheese or that isolationism, anti-communism or anti-Semitism is each a world-wide Nazi conspiracy to cause insubordination in the armed forces. But, according to recent Supreme Court decisions, the trial judge in free speech or civil liberties cases does not have discretion to deny a directed verdict of acquittal where the evidence is insufficient nor does the trial judge have discretion to fail or refuse to apply the Supreme Court's high standards which call for evidence proving criminal intent to cause the substantive evil charged—in this case, insubordination in the armed forces —and proving, also, clear and present danger.

The Sedition project director Rogge did say to several defense attorneys and representatives of the press that the government was encountering difficulty finding a judge to try the case. Just what this statement indicated, the reader can judge for himself.

It needs no argument to support the statement that if the government ever had sufficient evidence to justify the indictment and the holding of the Trial in 1944, it did not need to postpone the starting of a new trial in 1945 until it could get more evidence from Germany. Nor does it need argument that if the government had a case, it would not be delayed in starting a new trial by the problem of finding a judge. A prosecution case that requires a handpicked judge is something to write a book about, not something to try in a criminal court.

Unfortunately, there is a natural tendency on the part of most people who give this cause celebre any thought to take the view that these delays and difficulties were matters of court procedure and defense perversity rather than direct consequences of the lack of a proper prosecution case. It is easy to rationalize the farcicality of the Trial, the difficulty of finding a new judge for a re-trial and the failure of the government to move for a new trial within a reasonable length of time by stressing the quantitative aspects and procedural difficulties of trying a conspiracy charge against so many defendants. It is overlooked that in this case the government's biggest task was proving the existence of the conspiracy alleged and that this task would be exactly as big and difficult against three defendants as against thirty or three hundred. Proving that the defendants on trial joined the specific conspiracy alleged would not take much time, if there were evidence to prove such joining. The big and, in this case, impossible task is that of proving the specific conspiracy very elaborately alleged in the indictment, the bill of particulars and the prosecutor's opening statement.

The current rationalizations of the farcicality, delays and final outcome in the Sedition case are utterly unfounded and most unfair. If the conspiracy alleged had really existed and if any number of the defendants had participated in it, it would have taken comparatively little evidence to prove it. Nor would the Trial have taken an inordinate length of time. It was the nature of the prosecution case and not the perversity of defense tactics that made the Trial a farce and that, the authors suspect, made it so hard for the Department of Justice to find a "suitable" judge to retry the case.

The known historical record of the Nazis being what it is, there would seem no possibility of new evidence being discovered in Germany to sustain the prosecution theory. New evidence might sustain other charges against the Nazis. Plenty of evidence long known to all informed people would have sustained many other charges against the Nazis. New evidence might sustain new charges against some of the defendants or against almost any person in the country. But it is impossible to conceive of new evidence that would sustain this indictment as drawn, the now generally known evidence being what it is.

At the time this book went to press the only thing for the new Attorney General to do was to tell Congressman Sabath, PM, Philip Murray of the C.I.O. and all the other people behind the Trial that the Department of Justice had gone as far as it could in trying to please them with a prosecution aimed at isolationism, anti-communism and anti-Semitism; that the Department of Justice had neither law nor evidence to sustain convictions in this case; and that in the light of recent Supreme Court decisions repeatedly cited in this book this conclusion about the law and evidence is no longer open to argument. These decisions render the prosecution theory in the Sedition Trial completely untenable. Citing this fact should at any time through 1945 have sufficed to save the face of the Department of Justice vis-a-vis the people behind the Trial in any move to dismiss the indictment, on which the winning of a conviction after the war would have been highly improbable and on which, in the known state of the evidence, any conviction would have had to be reversed by the Supreme Court.

But justice will not be done to the defendants in this case merely by its dismissal and their release from bail. The Government owes compensation both to the defendants and the unpaid lawyers. The Congress of the United States should recognize the impropriety of the prosecution, *ab initio*, and the consequent obligation of the United States to compensate both defendants and unpaid lawyers for their losses by reason of what was a wholly unjustified political prosecution. This should be done not only as a matter of simple justice to the victims but also as a matter of creating a precedent to deter politically minded administrations from repeating in the future such persecutions by way of currying favor with given minorities and making a bid for votes at the expense of the rights, liberties and interests of other citizens. It is not good enough in this case for the Department of Justice to let the whole matter "die a natural death", to quote the phrase so often heard in informed circles around Washington in this connection.

Congress should set the precedent that whenever a Washington administration starts a prosecution it cannot finish for want of evidence and a proper case, the victims of that prosecution shall be suitably indemnified for their expense and losses as a result of such prosecution. If this is not done, there will be nothing to restrain politically-minded administrations in the future from putting on unwarranted political prosecutions to win votes and curry favor with given minorities. For an administration in charge of the federal law enforcement machinery, putting on a wholly unwarranted prosecution for political reasons is strictly a "Heads the administration wins and tails the defendants lose" proposition. It involves absolutely no cost or risk for the politicians responsible for the decision to perpetrate a gross injustice.

It is out of the question to talk of ever establishing criminal or impeachable responsibility against government officials for the starting of improper prosecutions. It is usually impractical, if not impossible, to prove that an error, administrative or judicial, is a crime. But it is practical for Congress to recognize the commission of an error in a political prosecution by indemnifying the victims and thus registering for the historical record a finding of error against given responsible politicians. The making of such a record will act as a deterrent against future repetitions of that sort of error and abuse of power.

A further and highly important deterrent from repetitions of political trials in which the prosecution is dictated by minority group pressures and selfish political motives and in which the prosecution lacks a proper case will be the prompt, timely and efficient intervention of powerful and vocal personalities and groups to point out what is wrong with a proposed prosecution before it gets under way. Had a Bar Association special committee or a real, honest-to-God Civil Liberties Committee given a competent preliminary examination to the third and final indictment in the Sedition Trial case, it could not have failed to conclude that this was an improper prosecution, and to point out much that has been explained at great length in this book about the indictment. The submission to the public of such a report or such comment before the case came to trial would have sufficed to deter the Department of Justice from undertaking the show and would have made it most unlikely that a judge could have been found to make possible a seven and a half months farce like the Sedition Trial.

It is to be noted here to the great credit of Senators Wheeler, Taft and Langer and Congressman Hoffman, that, during the course of the Trial, they spoke out most effectively on the floor of the Congress in criticism of what the government was doing. Senator Langer said that the Attorney General should have the moral courage to go in and dismiss the case while it was still on trial. But these conscientious and courageous statesmmen happened to have been opponents of President Roosevelt's pre-Pearl Harbor foreign policy. They were, therefore, linked with isolationism which was one of the principal objects of attack by the government through the device of the Sedition Trial.

In the final analysis, the only effective safeguard against bad government is public opinion. This factor should be promptly and effectively mobilized by appropriate leaders and groups interested in good government, fair play and due process of law whenever a witch hunt or an improper political prosecution is in the making. The conventional or orthodox view that a grand jury indictment presents a finding of fact which must be left to a judge and jury to try is not well founded where politics, minority group pressures or war hysteria have been controlling factors, or where the indictment consists of debatable conclusions, interpretations or definitions of terms rather than simple, triable allegations of fact. It was not necessary to have the Sedition case in the Washington courts for over three years and on trial for over seven months and finally dropped for failure to prosecute in order to enable any fair-minded, intelligent and informed reader of any one of the three indictments to reach the valid conclusion that a trial on such a prosecution theory would be improper and futile. Where an indictment recites allegations of fact which the prosecution proposes to prove to a jury, the conventional or orthodox view that the issues of fact and of guilty or not guilty should be left to a jury is the only view to take of the matter. But where an indictment recites a historical thesis and a series of conclusions, interpretations and theoretical propositions, which the prosecution proposes to prove, any citizen has a right to object to the use of the courts as a sounding board for political and partisan harrangue, argumentation and debate over propositions and conclusions which, till the end of time, must remain matters of opinion and inherently not susceptible of proof.

Any citizen has a right to insist that the law enforcement machinery and the courts be not abused and discredited to please some and persecute others by the staging of such farces as the Sedition Trial. It was a trial which never should have been staged. To reach this conclusion, one did not need to hear the government's evidence. One needed only to read the indictment and the bill of particulars, to know a little recent history and to use a little common sense.

APPENDIX NO. 1.

Editorial in The Washington Post, Sunday, July 16, 1944:

Mass Trial

The severance of three cases from Washington's mass sedition trial is the best news that has come out of this dreary affair in Judge Eicher's court. It clearly suggests belated recognition of the mistake that was made in bringing 30 individuals of widely varying temperaments and backgrounds to trial at the same time and place for a series of alleged offenses classified as sedition.

One defendant recently died. Another is too ill to attend court sessions regularly. A third found it difficult to follow the proceedings because of limited hearing. A fourth proved to be so obstreperous as seriously to interfere with the progress of the trial. In other words, the exigencies of human life are such as to defeat most any attempt to dispose of complicated criminal charges en masse with both fairness and dispatch. It is a pity that the Department of Justice did not foresee this elementary objection to mass trials before embarking on such an adventure.

The fact that four cases have been eliminated from the trial is overshadowed, therefore, by the larger fact that 26 cases remain before the court. We hope that better progress can now be made but no end of even the presentation of evidence by the prosecution is in sight after 13 weeks. How can the jurymen be expected to remember testimony given many weeks before their verdict will be rendered? How can they in these circumstances, distinguish the varying degrees of guilt, if any, among the 26 remaining defendants? We fear that whatever may be the outcome of this trial it will stand as a black mark against American justice for many years to come.

On Friday, July 28, 1944 this same newspaper carried the following editorial:

Courtroom Farce

For weeks Washington has been aware of the farcical nature of the sedition trial that is droning on from one weary session to another in Justice Eicher's court. Everyone who reads the newspapers knows that the trial has been characterized by obstruction, unruly conduct on the part of some of the defendants, unreasonable delays, prolongation of the testimony and cross-examination and laxity of control or direction. If there were any lingering doubts as to the farcical nature of the trial, they must have been removed by James E. Chinn's factual account of the proceedings on the "third day of the fifteen week" in The Post yesterday.

Justice Eicher has undoubtedly tried to make the best of a bad situation. He has attempted to prevent the trial from being turned into a comedy of errors; he has tried to keep it moving toward a conclusion. But the very nature of the case has thwarted his efforts. Mass trials may possibly be successful where the issues are simple and the testimony is brief—or where the Russian technique of condemning the defendants first and putting on a trial for show is used. But where the issues are complicated and defendants who have not been browbeaten stand on their democratic rights, a trial involving more than two dozen individuals is almost certain to be a fizzle.

We think the time has come to recognize the unlikelihood of securing any fair approximation to justice from this unhappy experiment. The end of the Government's testimony is nowhere in sight. Prosecutors have 4000 exhibits to offer in evidence and only about one-eighth of them are in the record at present. Then each of the 26 defendants will have to present his case. At its present rate of progress, therefore, the trial may run on for several years after the war is over. Meanwhile it is gravely undermining confidence in American justice.

Apparently it would be impossible now to end this sorry spectacle and try the individual defendants separately. But the court could probably sever additional cases and insist that the testimony be stripped down to essentials. After all, this is a trial of men and women accused of sedition, not a contest in befuddlement. In our opinion the trial can continue its present course only at the cost of serious impairment of our judicial system and the reputations of those responsible for this travesty.

And on August 2, 1944 PM had the following:

Sedition Trial Gets Ignored

By Elizabeth Donahue
PM's Bureau

Washington, Aug. 2—In one of the most abrupt reversals on editorial policy in modern newspaper annals, the Washington *Post* has withdrawn its reporter from the sedition trial, ridiculed the Government's case, and justified its decision on the grounds of "no news."

The paper, which took the lead in exposing many of the characters now before the District Court, has nevertheless found the trial newsworthy enough to use stories about it on Page 1 within the last week, and to devote generous space to the courtroom proceedings until today.

Post reporter Dillard Stokes, two years ago won the American Newspaper Guild's Heywood Broun Memorial Award for turning up crucial evidence against several defendants. Stokes is now in the Army.

The *Post's* managing editor, A. F. Jones, today told *PM* "I'm not going to keep a man tied up on a lot of baloney." He indicated that he would assign a man to cover the courthouse "if there's any big news over there."

The sudden disappearance of the *Post's* reporter, James Chinn, from the courthouse coincided with a mild gust of news on Capitol Hill.

But as a preliminary to Chinn's reassignment to the Capitol, the *Post* in an editorial, entitled *Courtroom Farce,* described the trial as a "sorry spectacle" and bemoaned the fact that the defendants were unlikely to get anything approximating "justice from this unhappy experiment."

The Washington paper in its exposure of the activities of some of the defendants two years ago, when they were before a Grand Jury, plumped and paraded the story in its news and editorial columns. At that time few other papers found the story as newsworthy as the actual trial, now described by the *Post* as a "courtroom farce."

No doubt, the foregoing article in *PM* and the people behind the Trial were responsible for the change of attitude of the *Post* in their editorial of August 21, 1944 entitled "Sedition Trial:"

SEDITION TRIAL.

Reports have come to us to the effect that the attitude of the Post toward the sedition trial in Judge Eicher's court is being grossly misrepresented by persons having axes to grind. Our expressions of concern because of farcical developments that have often marked this mass trial have been twisted into sympathy for the alleged seditionists. It is scarcely necessary to say that our criticism of ineffective judicial procedure involves no sympathy whatever for anyone accused of knifing his country in the back in the hours of its peril.

What *The Post* has criticized has been the obstructionist tactics of the defendants and the apparent bogging down of the trial. We complained because the attempt to try 26 defendants at the same time was prolonging the testimony and making it possible to defeat that speedy justice which is the aim of all American courts. Instead of rejoicing because a slow motion mass trial seems to be making little progress toward determining the guilt or innocence of the defendants, we deplore the choice of what appears to be an ineffective method of bringing the alleged seditionists to justice. For the same reason we are pleased to note that the trial seems to be making better progress than it had previously done. In spite of the obstruction and the blunders that have seriously detracted from the dignity of the judicial process in this case, we hope that all of the little men who are found to have played Hitler's game to the peril of their country will get their deserts.

APPENDIX NO. 2.

	Defendants and their	Attorneys
1.	Joseph E. McWilliams	Maximilian J. St.George
2.	George E. Deatherage	J. Austin Latimer
3.	William Dudley Pelley	William J. Powers
4.	James True (Severed.)	J. Austin Latimer
5.	Edward James Smythe	James J. Laughlin, then Ethelbert B. Frey, finally M. Edward Buckley
6.	Lawrence Dennis	Lawrence Dennis
7.	Howard Victor Broenstrupp	Ira Chase Koehne
8.	Robert Edward Edmondson	Ethelbert B. Frey
9.	E. J. Parker Sage	Harry A. Grant
10.	William Robert Lyman, Jr.	Frank J. Meyer Elizabeth R. Young
11.	Garland L. Alderman	Harry A. Grant
12.	Gerald B. Winrod	E. Hilton Jackson John W. Jackson George Siefkin
13.	Elizabeth Dilling	Albert W. Dilling
14.	Charles B. Hudson	Frank H. Meyers Elizabeth R. Young
15.	Elmer J. Garner (Died third week of trial.)	Marvin F. Bischoff
16.	George Sylvester Viereck	Ben Lindas
17.	Prescott Freese Dennett	Frank J. Kelly
18.	Gerhard Wilhelm Kunze	P. Bateman Ennis Arthur Carroll
19.	August Klapprott	Charles E. Morganston
20.	Herman Max Schwinn	Claude A. Thompson William A. Gallagher
21.	Hans Diebel	Same.
22.	Franz K. Ferenz	Joseph H. Bilbrey
23.	Ernest Frederick Elmhurst	James J. Laughlin, later, W. Hobart Little, then,

	M. Edward Buckley, and finally Orville Gaudette and John S. Hillyard
24. Robert Noble (Severed)	James J. Laughlin
25. Ellis O. Jones	Ellis O. Jones
26. Eugene Nelson Sanctuary	Henry Klein, who withdraw, then M. Edward Buckley, later Marvin F. Bischoff
27. David Baxter (Severed)	W. Hobart Little Ira Chase Koehne
28. Lois de Lafayette Washburn	
29. Frank W. Clark	Same.
30. Peter Stahrenberg	L. J. H. Herwig

APPENDIX NO. 3.

Names of Jurors

The Sedition Trial Jury shown in opposite illustration on the steps of the Courthouse, Washington, D. C.

LEFT TO RIGHT—FRONT ROW:

MRS. ALICE JUMP BILLINGSLEY AND MRS. JULIA TENNY BUTT;

SECOND ROW:

JOHN H. BAHLMAN, THOMAS B. BAILEY, FREDERICK A. RAULIN, NYLE B. EAKLE, CHARLES M. SAEGER, JR., EARLE R. ALVEY, JR., HENRY ASCHENBACH;

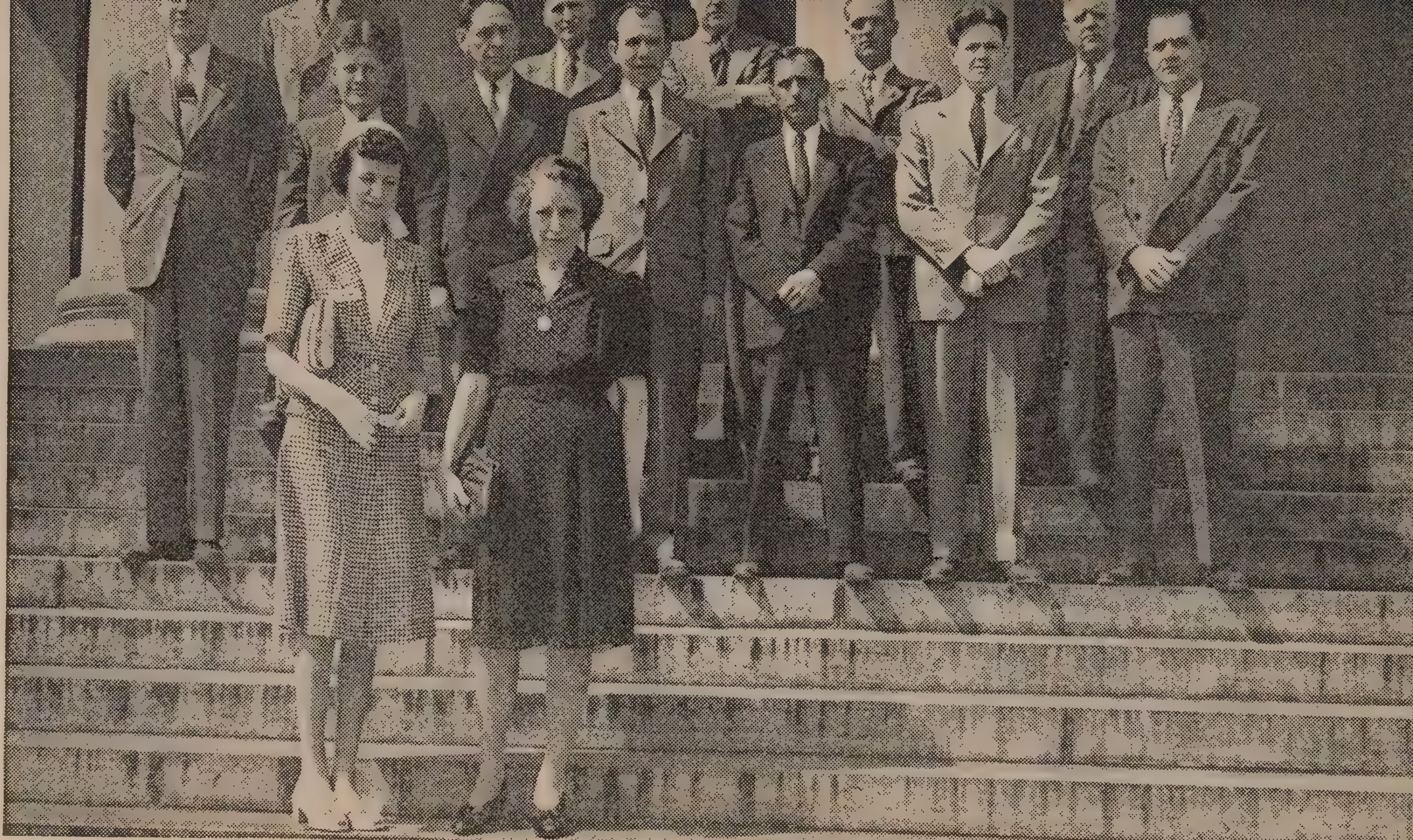
BACK ROW:

PAUL E. JOHNSON, JR., WILLIAM H. T. FLEMING, LEO F. DIEGELMANN, ANTHONY FALCONE AND WALTER I. PLANT.

NOTE:

PAUL E. JOHNSON, JR., AND WILLIAM H. T. FLEMING. were alternates.

(Photo by Press Association Inc.)



APPENDIX NO. 4.

There were twenty-eight defendants named in Indictment No. 70153 filed July 21, 1942. They were:

Gerald B. Winrod, Wichita, Kansas.

Herman Max Schwinn, Los Angeles, California.

George Sylvester Viereck, alias J. B. Hamilton, New York City and Washington, D. C.

William Griffin, New York City.

Hans Diebel, Los Angeles, California.

H. Victor Broenstrupp, alias the Duke of St. Saba; Count Victor Cherep-Spiridovich; Lieutenant-General Cherep-Spiridovich; Colonel Bennet; J. G. Francis; New York City and Noblesville, Indiana.

William Dudley Pelley, Noblesville, Indiana.

Prescott Freese Dennett, Washington, D. C.

Elizabeth Dilling, alias Reverend Frank Woodruff Johnson, Chicago, Illinois.

Charles B. Hudson, alias Reverend Frank Woodruff Johnson, Omaha, Nebraska.

Elmer J. Garner, Wichita, Kansas.

James F. Garner, Wichita, Kansas.

David J. Baxter, alias the Chancellor, alias John Pepper, alias John H. Rand, Colton and San Bernardino, California.

Hudson de Priest, Wichita, Kansas and New York City.

William Kullgren, Atascadero, California.

C. Leon de Aryan, San Diego, California.

Court Asher, Muncie, Indiana.

Eugene Nelson Sanctuary, New York City.

Robert Edward Edmondson, also known as R. E. Edmonson, New York City and Santa Barbara, California.

Ellis O. Jones, Los Angeles, California.

Robert Noble, Los Angeles, California.

James C. True, Arlington, Virginia and Washington, D. C.

Edward James Smythe, New York City.

Otto Brumback, Washington, D. C., and Luray, Virginia.

Ralph Townsend, San Francisco, California, Lake Geneva, Wis. and Washington, D. C.

William Robert Lyman Jr., alias Robert Lanham, Detroit, Michigan.

Donald McDaniel, Chicago, Illinois.

Otto Brennermann, also known as Otto Brenneman, Chicago, Illinois.

In the second indictment, No. 71, 203, filed January 4, 1943, the above named defendants were again indicted with the following added:

New York Evening Enquirer, Inc., New York City.

Paquita de Shishmareff, alias Paquita de Shishmarova, alias Mrs. Leslie Fry, alias L. Fry, Glendale, California and New York City.

George Deatherage, St. Albans, West Virginia.

Franz K. Ferenz, Los Angeles, California.

Frank W. Clark, alias G. P., Tacoma, Washington.

Lois de Lafayette Washburn, alias T.N.T., Chicago, Illinois and Seattle, Washington.

In the third indictment, No. 73,086 twelve defendants named in the preceding indictment were not included, namely:

Court Asher, Oscar Brumback, C. Leon de Aryan, Hudson de Priest, James F. Garner, William F. Griffin and his publication, the New York Evening Enquirer, William Kullgren, Ralph Townsend, Paquita de Shishmareff, Donald McDaniel, Otto Brennemann.

And eight new names were added, namely:

Joseph E. McWilliams, Lawrence Dennis, E. J. Parker Sage, Garland L. Alderman, Gerhard Wilhelm Kunze, August Klapprott, Ernest Frederick Elmhurst, Peter Stahrenberg.

Counsel St.George represented Dr. Donald McDaniel and Otto Brennemann in the first two indictments. The only reason, apparently why they were included in the first two indictments was that Dr. McDaniel, an ex-marine of World War I, had put out three cartoons, executed by the artist Otto Brennemann. These cartoons are set out in the third indictment as "History Repeats," "The Answer to the Betrayal," and "America on the March." Rogge dwelt on these cartoons in his opening statement and stated that millions of them had been distributed throughout this country; and in the course of the testimony three sets were introduced by him into the evidence. We have commented on them where they are mentioned by Rogge in his opening statement.

APPENDIX NO. 5.

The following quotations are the seven pieces of evidence put in during the entire seven and a half months course of the Sedition Trial against the defendant, Lawrence Dennis, one of the authors of this book. All these quotations were from defendant Dennis' writings. They had thus been reproduced in the *Weckruf,* the weekly paper of the German-American Bund, over a period of years. This was the only evidence the government put in against Dennis. And it was by this evidence that the government proposed to prove that he was a Nazi and in conspiracy with the Nazis to cause insubordination in the armed forces.

Government Exhibit No. 4248. Extract from the *Weckruf* of May 26, 1938. (Published over two years before the Law of June 28, 1940 was enacted.)

A LOOK IN THE MIRROR.

We are hearing a great deal these days about "aggressors" and violators of treaties, always—observe—either by Japan, Italy or Germany. The picture presented by the press of these picaroons gives the impression to the uninformed that the practice of breaking treaties and aggression is something unique and confined solely to nations endowed with a black complex of moral turpitude altogether absent in the United States and in our partner, Great Britain.

But contrary ideas have occurred to others besides ourselves, and we find this contrary opinion expertly expressed in a leading article by Lawrence Dennis in the May issue of the American Mercury, which you should read from beginning to end.

"Those who accept Mr. Chamberlain's view," he writes, referring to the savage criticism which our conservative press has heaped upon the British Premier for his "cautious policy," "are invariably confronted with what is thought to be a question for which there is but one answer, 'Do you propose to let Hitler and Mussolini get away with it?'"

"The logical answer from the point of view of American interests," Dennis continues, "is that Germany, Italy and Japan are only doing what Britain, France and we ourselves have done repeatedly in the past. Have we forgotten our conquest of Mexico or our conquest of the entire continent from the Indians? What of England's countless conquests of the past three hundred years? Even today England is bombing defenseless Indians and Arab villages in wars of pacification. France has had on her hands a war of subjugation in Africa almost continuously since the end of the World War."

"In March Hitler united Germany and Austria virtually without bloodshed and our press raved over the "brutal rape of poor Austria.' Between 1927 and 1932 the United States Marines in Nicaragua, a country of 600,000 inhabitants, killed some 3,000 natives. Did the European press rave over the wilful slaughter in a futile, undeclared war of American intervention?"

We have repeatedly drawn similar parallels, but it is some satisfaction to see the inconsistency of our national conduct and that of England and France, presented by others.

Government Exhibit 4342. Extract from the *Weckruf* of November 14, 1940.

WHO MAKES OUR FOREIGN POLICY?

Lawrence Dennis, noted writer on international affairs, states in his "*The Weekly Foreign Letter*" for the 17th:

"American policy is now hammered out in preliminary outline in small dinners given by Lothian to which F.D.R.'s brains trusters are invited. Then it is submitted to and discussed by the big chief. Then Lord Lothian communicates it to London. All this goes on 'off the record' and outside the files and archives of the State Department. F.D.R. is not letting anything get into the records that might embarrass him later. . . ." He also writes that "Circumstantial evidence now indicates rather strongly that Lothian's mission back to London is to carry a message too delicate to be put on the wires or in the valise diplomatique. We suspect that the gist of the message to Churchill is 'HOLD THE FORT FOR I AM COMING.' " "Churchill is under pressure from British capital and labor to get America in within the shortest possible time."

Later, Dennis emphasizes these two aspects of the problem: "Reassuring the British public that America is coming in; reassuring the American public that America is not coming in. This takes political artists like F.D.R., Churchill and Lothian, and a very high order of 'off the record' diplomacy and intrigue is now under way."

Government Exhibit No. 4348. Extract from the *Weckruf* of January 16, 1941.

THE STORY BEHIND THE DIES COMMITTEE.

From Lawrence Dennis' "Weekly Foreign Letter" of November 28, 1940 under caption "The Story Behind the Dies Committee."

"The White House saw the possible utility of the Committee for warmongering purposes. It could provide war hysteria and smear isolationists. The purpose of the German smear tactics is purely to intimidate American or native isolationists. If Washington wanted the recall of all German agents in this country, it could have it overnight by a simple note breaking off relations. The technique of the Dies smear is to identify opposition to American entry into war with activities of German agents too terrible to particularize. German agents, good Germans and German sympathizers are guilty of the twin crimes of being German and opposing American entry into the war. Any American who opposes American entry into war is a fellow conspirator and a criminal. For the Dies Committee to be in the best totalitarian tradition, it would be necessary only to call it a People's Court. The big idea is to damn, persecute or punish people for offenses which are not punishable under statutory laws. . . . We merely point out that legalized smearing where legal indictment would be impossible is a part of the American drift to Fascism and War, and we charge Washington with using the technique of the smear to these ends."

Government Exhibit No. 4295. Extract from the *Weckruf* of July 6, 1939.

THE POLITICAL GENIUS OF HITLER.

As an American writer described it in an issue of a onetime representative American magazine.

At the request of readers we reprint in part an article by Lawrence Dennis which appeared under the title "After the Peace of Munich" in the American Mercury before that one-time excellent monthly passed into the hands of a Jewish concern and under Jewish editorship. The article is as timely today as it was six months ago.

". . . Unpalatable as it may be for us to accept the idea, it must be recognized that Hitler, when analyzed simply on the basis of historical fact, is not only the greatest political genius since Napoleon, but also the most rational. During five years, Hitler has not made one important mistake or suffered one serious setback in the realization of his objectives. He has transformed Germany from a vanquished nation, fettered with the chains of the peace treaties, into the master of Europe. He has added 12,000,000 Germans to the Reich. . . . The truth of the matter, which the American press has persistently distorted, is that in recent years it is the dictatorships which have been rational and the democracies which have been most irrational. Hitler's achievements have left Americans stunned because they upset cherished American assumptions about the insanity of the dictators and the triumphant rationality of the democracies. A rational political genius who gets what he wants is incomprehensible to a people steeped in the irrational rationalism of men like Woodrow Wilson and Franklin D. Roosevelt who start things they cannot finish. It should be remembered that the American State Department has not scored a diplomatic success since the despatch of Cleveland's bombastic communication to the British over Venezuela in the nineties, while Hitler has scored nothing but successes in the diplomatic field for the past five years.

"Even Hitler's much caricatured emotionalism is one of the most rational things about him. He knows that the masses can be united and led only by their emotions, and he knows how to unify and lead them through their emotions. Anyone who thinks that the masses can be unified and led otherwise may be a rationalist, but he is no more rational than a man who pours water instead of gasoline into the tank of his automobile. In the Czech crisis, while the American newspapers were running scare-heads making Hitler seem a madman amuck, his every move was as coldly logical as it was immediately successful. The crime of our press was not falsification in reporting these moves, but gross misrepresentation in interpreting them. . . . Hitler got his objective 100% simply because his every move was rational. . . . We have seen that we cannot stop Hitler or Racism by hysteria, moral indignation or misrepresentation. The Haves are on the defensive, but they must not expect to be able to solve their problem through a victorious war over the Have-nots. The Haves cannot afford to fight; the Have-nots can. However distasteful it may seem, the only policy for the survival of the Haves is one of appeasement, accommodation, and sharing the wealth so far as the Have-nots are concerned. Law enforcement against the Have-nots should try to appease the Have-nots as much as possible at the expense of the backward peoples or areas. The Haves should try also to enlarge the trade opportunities of the Have-nots by artificially raising living standards in the Have areas, thus increasing the volume of goods which can be bartered with the Have-not countries. This means that the Haves must avoid deflation and foster state-subsidized or state-stimulated capital investment and consumption.

"The most important lesson for us to learn from the Czech crisis and the Munich Peace, however, is that we are living in a new world in which the principles we used to believe firmly established are, in large part, invalid. We must expect the Great Powers to follow, not the precedents of the past but the logic of the great new ideologies on the ascendant. And we must expect the logic of these ideologies to shape our own developments, political as well as economic. Force has always ruled the world. So long as the democracies or the Haves had the upper hand, their rule of force was piously called the rule of law. Now that the force factors have become more evenly divided between the Haves and Have-nots, it will be said by the Haves that, wherever the force of the Have-nots is paramount, on the Yangtse or the Danube, there is a rule of force, violence, unreason and lawlessness. The distinction is simple: the rule of my force is the rule of law; the rule of your force, if it is against me, is the rule of lawlessness and violence. Our newspapers, radio commentators and columnists owe us an interpretation of the news more in line with the logic of the new ideologies and their imperatives and less in accord with the wishful thinking of tired liberals and old-fashioned conservatives.

Government Exhibit No. 4331. Extract from the *Weckruf* of August 1, 1940.

BEHIND THE CURTAIN.

Lawrence Dennis in *The Dynamics of War and Revolution*: "Our trouble is that we think and feel, not as Americans, but as moralists, religionists, legalists, capitalists, and, last but not least, as loyal British colonials."

"The British have through many centuries, and still have today, the advantage over us of being fairly united as a people over British interests, not moral abstractions. At the same time they are past-masters in the manipulation of the moral symbols by which the American people can be moved like puppets into war."

Government Exhibit No. 4346. Extract from the *Weckruf* of January 2, 1941.

WHAT AILS US.

(From the new book by Lawrence Dennis: *The Dynamics of War and Revolution*:)

"Our trouble is that we think and feel, not as Americans but as moralists, religionists, legalists, capitalists and, last but not least, as loyal British colonials. We love moral abstractions, not American blood which we are ready to spill in torrents for moral abstractions. We are loyal to freedom for the Finns or the Poles or to justice for the Chinese, but not to employment for Americans. Employment is not a moral abstraction. A White House Conference on Children in Democracy reported on January 18, 1940 the finding that two children out of every three in America live in homes where income is inadequate for a decent standard of living. This, of course, is largely due to the fact that the poor have most of the children in a democracy. Does that state of affairs excite any wave of moral indignation in America as does the plight of the Chinese, the Poles, the Finns or the Abysinnians? Obviously not. Our elder statesmen, our Mr. Hoovers, go into action and morally mobilize America for relief of the Belgians, or the Finns, but not for the ending of unemployment of ten million Americans."

Comment:

The war proved America's solution of unemployment. The war is now over and unemployment is with us again. Its solution, except by more war, is still not in sight. Dennis argued against America turning to war as a solution of unemployment. His argument must be judged on its merits in the light of history. We leave it to the reader to judge whether the above and the only evidence during the Trial about Dennis supported the charge of the prosecution that he was a Nazi and conspiring to cause insubordination in the armed forces.

APPENDIX NO. 6.

A list of Some of the Published Articles of Defendant Dennis:

Title of Article	Where Published	Date
What Overthrew Leguia.	New Republic	Sept. 17, 1930
Sold on Foreign Bonds. (5 Articles.)	New Republic	Nov. 19—Dec. 17, 1930
Revolution, Recognition, and Intervention.	Foreign Affairs	Jan. 1931
Nicaragua: In again; out again.	Foreign Affairs	April 1931
Columbia and the State Department.	New Republic	Mar. 2, 1932
Can the Banks be made Safe?	Nation	Mar. 15, 1933
Money, Master or Means?	Nation	Mar. 22, 1933
The Squirrel Cage of Debt.	Saturday Review of Literature	June 24, 1933
H. G. Wells' Internationalism.	Saturday Review of Literature	Sept. 9, 1933
Fascism for America.	Annals of the American Academy	July, 1935
Portrait of American Fascism.	American Mercury	Dec. 1935
The Highly Moral Causes of War.	American Mercury	Jul. 1936
Soviet Russia Goes on Sale.	American Mercury	Dec. 1936
Russia's Private War in Spain.	American Mercury	Feb. 1937
Liberalism Commits Suicide.	American Mercury	Oct. 1937
England Liquidates Liberalism.	American Mercury	Apr. 1938
Propaganda for War: Model 1938.	American Mercury	May 1938
The Real Communist Menace.	American Mercury	June 1938
How to Rig a Bull Market.	American Mercury	Sept. 1938
What Price Good Neighbor.	American Mercury	Oct. 1938
Class War Comes to America.	American Mercury	Dec. 1938

After the Peace of Munich.	American Mercury	Jan. 1939
Can Democracy Put Men Back to Work?	Current History.	Jul. 1939
Party State and the Elite; Who Owns the Future?	Nation	Jan. 11, 25, 1941

Books by Dennis

Title	Publisher	Year
Is Capitalism Doomed?	Harper	1932
The Coming American Fascim.	Harper	1936
The Dynamics of War and Revolution.	Harper and the Weekly Foreign Letter	1940

APPENDIX NO. 7.

Reproduction of Official United States Army Review of Dennis' Book THE DYNAMICS OF WAR AND REVOLUTION, named in the Indictment.

This is a reproduction of a letter, written on United States Army letterhead paper signed by an Army officer in charge of the U. S. Army Information Service in New York. It was addressed to the publication of defendant Dennis, THE WEEKLY FOREIGN LETTER, also named in the indictment. The letter thanked Dennis' publication for complying with the U.S. Army Information Service' request for a copy of his book, and expressed the official army opinion about the book in the accompanying copy of the official army review of the book, which is also reproduced below.

The authors could submit a large number of reviews of Dennis' book in question. They only reproduce this particular review because it happens to be that of an official army reviewer and because the charge in the Sedition Trial against Dennis and against this book was that both formed part of a world conspiracy to cause insubordination in the armed forces.

The Department of Justice under Biddle, who professed to be believer in freedom of speech, charged that Dennis' book was subversive and had been written and distributed in furtherance of a conspiracy to cause insubordination in the armed forces. The army reviewer of this book said that it was "stimulating to thought" and that "The book is recommended to Army officers for reading because it gives in lucid, smoothly moving English the viewpoint of a thinker who has become disgusted with the easy-going habits of the democracies and favors a radical change to put an end to such habits." Presumably the army officer reviewing books for U. S. Army officers was not able to detect in this book the incitement to insubordination which the Department of Justice proposed to prove to a jury.

As the Trial ended long before the government had finished the presentation of its case, this particular piece of defense evidence was not introduced into the record any more than thousands of similar pieces of defense evidence which the defendants had to offer. It was fortunate for the government that the defense never had a chance to present its evidnce.

U. S. ARMY INFORMATION SERVICE
Room 1316-D, 90 Church Street FJP/aq
New York, N. Y.

November 22, 1940.

The Weekly Foreign Letter
515 Madison Avenue,
New York, N. Y.

Gentlemen:

Attached is a review on the book "The Dynamics of War and Revolution" by Lawrence Dennis, which we said would go forward as soon as time permitted.

The attached review is by Major Jack J. Rohan, and it is requested that should the review or any extracts of it be used, that the name be not used identifying the reviewer, owing to certain War Department restrictions on officers on active duty.

Thanking you again for your courtesy, I am,

Very truly yours,

F. J. PEARSON,
Lieut. Col., GSC,
Officer in Charge.

Encl. 1.
(Review)

"The Dynamics of War and Revolution" by Lawrence Dennis. Published by: The Weekly Foreign Letter, 515 Madison Avenue, N.Y.C.

Mr. Dennis declares frankly that his book is for the "elite", whom he describes as those having sufficient dynamic force to seek, and probably achieve, a hand in government. This reviewer intends no disparagement of Mr. Dennis's work in venturing the opinion that the writer missed his mark. To appreciate properly the cold objectivity with which Mr. Dennis discusses the history of industrial capitalism, a reader requires a sound knowledge of economic history and at least a nodding acquaintance with the writings of economists from Adam Smith down to Thorstein Veblen, including the almost forgotten "Essay on the Principle of Population, etc." by Reverend Thomas Robert Malthus and the long-winded, much talked-about and rarely read "Das Kapital" of Karl Marx.

"Elite" readers lacking such equipment are more likely to damn Mr. Dennis as anti-British, pro-Hitler, pro-Communist or just plain "subversive" than to gain any thought stimulation from his observations, and it is the sad truth that starry-eyed dreamers in the ivory towers of endowed educational institutions, and parlor pinks of the literary teas, are more likely to be familiar with the literature mentioned than are the dynamic types capable of influencing the trend of political action.

Mr. Dennis has a low opinion of the "masses" and uses the term to include the average business man as well as the indigent dependent on relief. He sees virtually no difference between the organization of business men seeking some special concession, privilege or protection for their field of enterprise, and an organization of penniless unemployed seeking a government dole.

Mr. Dennis gives the back of his hand to the wishful-thinking economists of the Irving Fisher school and sticks a pin of logic into no small clump of fallacious economic bubbles. He obviously has no patience with the sacerdotal smugness of the well-fed economic forecasters who tell the nervous holders of shares in hard-pressed enterprises what they desire most to hear. His iconoclastic approach to their temple makes it a bit surprising that he should adhere to their nomenclature and designate absentee-investement-exploitation as "industrial capitalism" which it definitely is not. The answer seems to be that when Mr. Dennis is discussing the history of political and economic evolution which brought about the systems with which we are familiar today he is on sure, firm ground, but when he undertakes to explain the breakdown of world-economy and to forecast the future or prescribe a remedy he is no less confused than the wishful thinkers. His confusion, however, appears to be the result of his impatience with the stupidity of the great mass of humanity, an impatience which gives him a gloomy and pessimistic viewpoint. His conclusion that democracy as the American people have known it is on the way out merely echoes the opinion expressed by Viscount Bryce more than half a century ago.

In the "American Commonwealth" Bryce indicated that he considered the American system headed for the rocks, and probably would be surprised to find it still afloat and going places. Mr. Dennis apparently concurs in the opinion of Bryce that "democracy contains the seeds of its own destruction." The fact is that it contains the seeds of constant change, and as the French say "the more it changes, the more it is the same thing."

Mr. Dennis's suggestion that there should be a curb on control of propaganda, and specifically the press, by private interests, indicates that he has been living in an ivory tower insofar as the press is concerned. No institution is more allergic to public opinion than the press. Any publisher who persistently advocated unpopular policies would be out of business within a couple of years unless he had the wealth of the entire country behind him. Newspaper publishing is too costly for anyone except a government to undertake to use a newspaper to "educate" the public into approving policies which they dislike. Mr. Dennis will draw no bouquets for that opinion. He may have to dodge a few brickbats.

His views of the necessity of changing the public attitude toward their country from one of "gimme" to one of willingness to sacrifice will without doubt be widely approved.

His last paragraph is worth remembering. It reads:

"The first requisite of the new revolution in America will be a shift in emphasis from success to sacrifice—for America. One will hear less about the rights of man and more about the duties of men and the rights of the American people."

This book will stir up considerable controversy and probably will draw more criticism than commendation. This reviewer, while disagreeing with many of Mr. Dennis' conclusions, and with some of his premises, finds the book stimulating to thought. And any book that has that quality is well worth reading. The book is recommended to Army officers for reading because it gives in lucid, smoothly moving English the viewpoint of a thinker who has become disgusted with the easy-going habits of the democracies and favors radical change to put an end to such habits.

APPENDIX NO. 8.

SMEAR—A Recent Incident—by John T .Flynn. Published by National Economic Council, Inc., 350 Fifth Avenue, New York 1, N. Y.

FOREWORD

In recent years the Marxists have had an epithet for all who oppose Communism. They call them "fascists."

Mr. Flynn's article published herein may surprise some persons who have not sensed the real trend in communistic propaganda. But it gives an accurate picture of the un-American hate that these alien-minded gentry seek to cultivate in the United States.

We recommend this pamphlet particularly to those comfortable and self-satisfied persons who still take no stock in the danger of Communism.

National Economic Council, Inc.

Smear—A Recent Incident

By John T. Flynn

Those who are interested in what might be called the Anatomy of Calumny will, I am sure, find food for instruction in the following description of a Smear—a very effective smear—in the act of being propagated. It is entirely possible that at some time or other you may have been told that Merwin K. Hart is a dangerous and notorious agent of anti-semitic propaganda and a leader among American fascists. Perhaps you have wondered why he has been thus labeled. What I shall relate here will help you to understand that and a good many other things as well.

On Thursday, July 27, 1944, a meeting was assembled in Swan Lake in the Catskill Mountains in New York State, to which a large number of men and women of Jewish faith, on vacation in the mountains, were invited. The meeting was sponsored by a religious monthly called *The*

Protestant. The speaker was Mr. William Gailmor, a radio commentator then on Station WHN. What he said was certain to be received with sober consideration. Was not *The Protestant* a reputable magazine sponsored by more than a thousand American clergymen and recommended even by so eminent a person as the wife of the President? Was not Mr. Gailmor a man of education accepted by a reputable radio station as a competent interpreter of the news? And were not these favorable impressions strengthened later when he became a commentator on WJZ, key station of the great national radio Blue Network, sponsored by the Electronics Corporation of America?

Mr. Gailmor, while extolling the "great work" of *The Protestant* in fighting anti-semitism, took a moment out to tell a little story. He said in part:

> "Let me tell you of a certain incident which occurred at the Republican Convention (1944) at a meeting of the Resolutions Committee. This Committee, consisting of 90 members, presided over by Senator Taft, had before it a resolution to make racial bigotry, such as anti-semitism, a crime. There were a number of people ready to talk in favor of the resolution. There were also people opposed to it. Their spokesman was the *notorious fascist Merwin K. Hart,* who spoke for about an hour. He referred continuously *to and attacked Lehman, Rosenman, Frankfurter and President 'Rosenfeld.'* His talk was full of anti-semitism and bristling with invectives and when he was through *he was vociferously applauded by the Resolutions Committee presided over by Senator Taft.* The spokesmen *for* the resolution were given very little opportunity to say anything. I am not saying that the Republican Resolutions Committee or its chairman, Mr. Taft, are anti-semitic. But definitely when people in high office applaud a speech of that type by **this notorious** *man Hart,* then we have before us a situation such as Germany had in 1932." (Italics supplied.)

Can anyone blame our Jewish fellow citizens for their conviction that anti-semitism is about to devour them in America when they hear from supposedly trustworthy sources reports like this? Now let us have a look at Mr. Gailmor's statements, at Mr. Gailmor himself and at *The Protestant* magazine which sponsored him.

His statement contained several distinct allegations:

1. That Merwin K. Hart appeared before the Republican Resolutions Committee to oppose a resolution to outlaw racial intolerance.

2. That his speech bristled with anti-semitism and attacks upon Lehman, Frankfurter, Rosenman and "Rosenfeld."

3. That he was allowed to speak an hour while supporters of the resolution were scarcely heard.

4. That when he finished, his speech was vociferously applauded by the Committee—of which there were 90 present.

Every one of the statements is a deliberate invention—a lie out of the whole cloth.

1. Hart did appear before the Resolutions Committee but he did not speak on the racial intolerance resolution but on a seven-point program of his organization—the National Economic Council—relating wholly to political and economic problems, expressing views utterly unrelated to race or religion in any form.

2. Never once did he mention any of the names listed. Not one word did he utter which directly or indirectly touched the Jews or any other race or religion.

3. He did not speak for an hour, but for ten minutes only, to which allotment he was rigidly held by the chairman, having barely time to read the statement of the seven-point economic program of his organization.

4. His speech was not vociferously applauded by the Committee and even if it had been it could not possibly have implied an approval of anti-semitism since the subject was not even remotely referred to.

All this is attested by the most reputable witnesses. This vicious lie would never have come to light had there not been present at the Swan Lake assembly some persons, gentlemen of Jewish origin, who were shocked at the story and who deeply resented it. The people present would have carried away merely the impression of Hart as a purveyor of racial bigotry, as scores of other audiences have done where there was no one to call attention to the calumny.

Now who is this gentleman, Mr. William Gailmor, well-known commentator for WHN and later for WJZ, whose poisonous messages are put on the radio regularly at a cost of many thousands of dollars to an American corporation? Well, first of all he is a thief—a self-confessed thief, to put the matter bluntly. His name in Margolies. On March 29, 1939, only five years ago, he pleaded guilty in General Sessions Court of New York City to a charge of grand larceny in the first degree. He had stolen an automobile and he confessed that this was the sixth he had stolen. Mr. Westbrook Pegler has published these facts in his column in the New York *Journal-American* (December 22, 1944). And he records that "psychiatrists examined Margolies and, on the strength of their recommendations, he was placed on probation and went to an institution for treatment." He is still on probation as a convicted thief and will be until next May. He is also on the radio. After his conviction he changed his name to Gailmor, a mere rearrangement of the letters. This is the "gentleman" who was put on a platform by *The Protestant* to blacken the character of an honorable American citizen and the Resolutions Committee of the Republican Party with a set of vicious lies.

Now what is *The Protestant,* the "religious magazine" which is carrying on the great fight against anti-semitism?

This curious phenomenon in American journalism is an example of the manner in which subversive elements work under various masks and disguises. This magazine is one of those disguises. Its editor and inspiring spirit is a gentleman named Kenneth Leslie. Frederick Woltman, in the New York *World-Telegram,* February 9, 1944, thus described him:

> "Mr. Leslie has had a somewhat interesting and varied career. A native of Nova Scotia, he at one time or another taught, lectured, farmed an apple orchard, bought and sold stock, led a dance orchestra, studied acting, wrote poetry, operated a buttermilk restaurant in Los Angeles, sang Hebridian songs over the radio and published popular songs under the firm name of Leslie and Fitzgerald. At one time he was on the staff of the First Baptist Church of Montclair, N. J. For a period, according to former associates, he went in strongly for Catholicism, studying the rituals and even carrying a St. Theresa religious medal."

He has drifted far from these miscellaneous moorings now. The magazine which, on its face, seems to be a journal devoted to religious discussions is, in fact, devoted, so far as it deals in religion, to the most incessant denunciation of the Roman Catholic Church, to the most slavish exaltation of the Soviet Union and to persistent efforts to inflame the Jewish and Negro citizens of America against their "enemies" with which, according to *The Protestant,* the nation seems to be swarming. Hewlett Johnson's book "Soviet Power." which was originally published by the Communist Party in this country, was put out in another edition by *The Protestant* and, under this allegedly religious imprint, got a far greater circulation than was possible to the Communist Party.

On November 7, 1943, Brother Leslie wrote in the *Daily Worker,* official organ of the Communists:

> "If there is a heart of justice in the universe it is beating now in the Red Army. I believe in that heart. *I call it God.* . . . The religion that will be acknowledged in the Soviet Union will be based on the actual working out of community among individuals, economic units and national groups. It will be beautiful. . . . "

Communist writers are among the most numerous contributors to *The Protestant.* In seven issues of the magazine I noted 26 articles in praise of the Soviet Union and its philosophy. There were almost as many articles bitterly criticising and attacking the Catholic Church in this country and Europe. The religious journal which weeps crocodile tears over anti-semitism is itself the most virulent provocateur of anti-Catholicism.

Even Stalin does not seem to be Red enough for Leslie, for he criticised that amiable dictator when he dissolved the Comintern—the Communist agency for international propaganda and penetration. No man can read this magazine without perceiving that its chief purpose is to inflame Protestants against Catholics and both against the Jews by inflaming the Jews against them. One cannot refrain from asking why, when this country is at war and when the President of the United States is constantly asking for unity, this magazine should be so persistently engaged in the business of dividing the population upon such delicate and explosive issues as racial and religious antagonism.

Just as Stalin is not Red enough for *The Protestant,* so many Jewish leaders are not pro-Jewish enough. The magazine has made a favorite target of the American Jewish Committee which at times has seemed almost anti-semitic to Leslie. But this will be understandable if we remember that not only can Christians be arrayed against Jews, but that Jews can be aroused against Jews, just as Christians can be set at war with other Christians.

Jewish leaders of whatever faction have been able however to agree on one thing, and that is that they do not want Mr. Leslie and *The Protestant* as their defender. The four leading Jewish organizations—the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League of B'Nai B'rith and the Jewish Labor Committee—have issued statements advising Jews not to support the so-called *Protestant* magazine. One of these statements says that *The Protestant* "belies its name by circulating *largely among Jews* and by seeking the major part of its support from Jewish organizations and individuals." The Jewish Labor Committee said: "For a sectarian Christian magazine to meddle in internal Jewish affairs and to *foment factional strife among the Jews on purely Jewish issues is not only in bad taste but is positively immoral.*" There is a good deal more to the story of *The Protestant* but this will suffice for the time being.

So far as I am concerned, I have noticed this whole incident because I have been interested in the last few years in observing the guerrilla operations of these masked gangsters of defamation and the profound effect they have been having on the state of public opinion in this country.

I am not interested in the political or economic opinions of Mr. Hart. He is entitled to hold them. I have made a diligent examination of many facets of this whole Smear Front and, as part of that examination, I have industriously inquired as to the charges made against numerous persons who have been the favorite targets of these professional calumniators.

Mr. Hart's view on political subjects would, I would say, square perfectly with those held by most Americans who subscribe to the traditional position of the Republican Party. He has supported the immigration laws and for this he has been branded as anti-semitic, an obvious and outrageous injustice. As to fascism, I should say he is as far from the school which preaches the planning and control of the national economy by the State and the assumption by it of dictatorial political powers, as is the pole itself. It is possible for Americans of many schools of thought to disagree with Mr. Hart's political philosophy, but perhaps the last thing in the world he can be charged with is an affinity for the philosophy of fascism. He is vigorously and industriously anti-Communist.

The Communists have a new verbal trick by which they divide the world into Communist and anti-Communist. If you are anti-Communist then you are pro-fascist. By this piece of wordy legerdemain all who are most energetic in opposing the Communists are branded fascists and all who favor restricted immigration are called anti-semitic. Starting from this base the calumniators never lack for "proof" of their charges. Nothing more is needed than a lying tongue. The fantastic William Gailmor and his Swan Lake address on Hart are a perfect specimen of the means by which their charges can be "implemented" and "documented."

The men who manage this arsenal of defamation are, generally speaking, "nobodies." By what means, then, can they bring to bear in their aims so much power? Because they have mastered a technique in which they put behind their schemes the prestige and often the funds of people of wealth and importance. Thus Leslie and his colleagues and, in the instance related here, Gailmor, are of no consequence. As out-and-out Communists they could get neither support nor an audience. But under cover of a supposedly Protestant and religious journal devoted ostensibly to tolerance they can get the sponsorship of more than a thousand reputable Protestant clergymen and they can get the endorsement of the most eminent persons. Here is one:

"MY DAY" by Eleanor Roosevelt

> "Hyde Park, Sunday—For some time I have been wanting to tell you about various things I have been reading, and this fairly quiet day is a good opportunity.
>
> "Perhaps you subscribe to the *Protestant Digest* (former name of *The Protestant*—Ed.). It is not just a Protestant magazine, but it does try to awaken those

> of us who happen to be Protestant to a realization of our responsibilities and interests in the world. I found it interesting. It is always stimulating to realize that if you belong to a certain religious faith there is a responsibility to make sure your thinking is constantly progressive and that you are a living force, not a static one.''

Most decent men and women are for racial and religious tolerance. They are willing to lend their names to an enterprise that has this as its frontal aspect. They are foolish enough not to look behind the facade at the ugly real purpose which is concealed and which is not tolerance at all, but the exploitation of every kind of bigotry which the manipulators can locate in the community for the purpose of advancing political and social philosophies that the sponsors would not dare to support. And Gailmor, notwithstanding his unsavory past and his equally unsavory companions and sponsorship, can get the use of the microphone of a national radio network to indoctrinate the American people with the shockingly un-American principles which at the moment he is paid to propagate.

Now to return to Mr. Gailmor, the motor car thief-philosopher. Had he made off with Hart's automobile, which he might well have done had he found it handy, thus adding a seventh theft to his string, a vigilant prosecuting attorney would have stepped in to defend Mr. Hart's property. But instead of an assault on Mr. Hart's automobile the miscreant commits an assault on his character; not just on his honesty, but on his loyalty as an American citizen and his position as a civilized person. And though this is a gross violation of the law, far worse than stealing cars, no prosecutor seems to be in the smallest degree interested.

However, Mr. Hart, and, for that matter, Mr. Gailmor, his traducer, are mere incidents in this little drama. It is no more than a small fraction of a social disturbance of the utmost gravity. What we have witnessed in the performance at Swan Lake just described is a function differing essentially no whit from that service which Mussolini attended to by beating his opponents over the head with a rubber hose. Thus Mussolini taught his critics that it did not pay to stick those heads up too high. We are not yet at the stage where disputants feel free to bring out the rubber hose. But the groups represented by Gailmor have an instrument of compliance far more deadly and effective in this country. It is the organized smear.

There are at least four organizations in this country now, well-financed, with large offices and staffs and corps of under-cover agents, which operate as terror organizations through the use of the smear. They have busied themselves for the last four or five years blackening the names and, in many cases, assassinating the characters of numerous honorable and respected American citizens. The technique is to fasten on them the brand of "fascist," "Nazi," and "anti-semitic." This is the penalty for disagreeing with the political objectives of these people in this country and abroad.

Hart is blackened, not to do him a personal injury merely, but to render him ineffective as an instrument of opposition and as an example to others. Having been smeared as a "pro-Nazi" and as an "anti-semitic," the assumption is that other citizens will not want to be associated with him in any kind of organized social movement. This would not be serious were it not for the fact that what has been done to Mr. Hart by this blackguard Gailmor has been done to hundreds of the most respectable men in America. Men who never dreamed of harboring a thought of intolerance against Jew or Catholic or any other religious groups have been pilloried as violent Jew-haters.

The results have been magnificent from the point of view of the men who have been operating this racket. Not only have they brought hundreds of active and effective citizens under a cloud and thus diluted the consequences of their opposition, but they have succeeded in convincing hundreds of thousands of our Jewish citizens that these men are their sworn enemies.

This in turn has given these citizens a perfectly reasonable ground for joining in the criticism and attack. This in turn can be counted on to stimulate anti-semitism in the bosoms of the victims and the thousands, indeed millions, of citizens who know them and respect them and resent the smear. A more diabolical device was never invented by the brain of man to brew hatreds and divisions among a free people who have a need at this moment to be united at least in their respect and tolerance for each other's spiritual freedom.

In describing this devilish technique and its victims I am not referring to those scores of wretched or disloyal persons whose names have figured in various news stories and who have been the active or compliant agents of truly fascist or anti-semitic groups. For the most part these creatures are unimportant, impecunious and, very often, stupid. But they, in their turn, have served a very useful purpose in the hands of the professional smear troopers. The names of hundreds of men and women, many of whom among our most distinguished citizens, have been stained by these brokers in calumny by mentioning their respectable names in company with the names of known or suspected persons. It is very easy, for instance, for one of these smearers, many of whom have access to radio, newspapers, magazines, to tell a yarn about the obvious disloyalty of some prosecuted and convicted offender and then mention, as a sort of side-swipe, that he is a "friend of Senator Wheeler." The constant repetition of this oblique calumny can do its work as thoroughly as if a long and implemented indictment had been presented and proved.

Take the incident I have described here. We see this professional character assassin Gailmor not only smearing Mr. Hart by picturing him as delivering a vicious anti-semitic address, which he never delivered, but we see the traducer sweeping the tar-brush over the Resolutions Committee of the Republican Party by recording that they received Mr. Hart's attack with "vociferous applause," while giving Senator Robert Taft a flick of the brush by naming him as the chairman who let Mr. Hart talk an hour while shutting out the proponents of the anti-semitic resolution.

I repeat this is a solitary incident of this diabolical technique which is being practiced on a great scale against men and women in every community and against national leaders—religious, political, economic—who dare to oppose the schemes for remodeling the world of the men who operate the organizations to which I have referred.

The American people are being slugged over the head by a small handful of intellectual gangsters loose in the nation. Some means must be found to deal with them and to bring their depredations to an end. No form of society can live with such a savage organism in its body any more than an animal can live with the deadly germs of physical disease eating at its vitals.

Obviously the only method which a civilized man who believes in the forms of our society can use is the exposure of the miscreants who use this weapon and, along with them, the foolish men and women, some of them well-meaning, who supply the funds and the prestige behind them.

If this does not succeed I shudder to think of the consequences. The task of dealing with the outrages will pass into the hands of angry and violent men.

Up to now the offenders have been almost completely immune from exposure. Let any man or woman who has suffered, or let any writer who has observed this dark phenomenon in eruption attempt to describe it—to expose it—and see how far he will get in finding the printed page, the radio or any other medium of communication at his disposal.

The extent of the intimidation is beyond belief. The volume and violence of the revolt against this murderous device will be proportioned to the extent to which the victims and society itself has been deprived of the defenses which ordinarily free people use against such offenders.

I have written this mere incident illustrating the disease in the hope that people may be at least acquainted with its presence in our midst. That is the first step toward the cure.

A

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ADDENDA

Chicago, Illinois, May 23, 1946.

To the Reader:

No doubt you are interested to know what has happened to the Case since the preceding pages came off the press. You know that right after the date of the mis-trial the people behind the Trial began pressuring the Department of Justice to have a re-trial.

Already in February 1945, the defendants had requested the court to set a day for trial or to dismiss the Case. Nothing was done by the prosecution.

Finally, in January 1946 a more determined effort was made by the defendants to have the Department of Justice say what it intended to do with this Case. On February 2, 1946 Mr. Rogge filed an answer to the defendants' motions to the effect that ''the United States has since (March 16, 1945) been ready for trial''. However, a month later, in March 1946, Mr. Rogge filed a ''Motion For Time'', asking for forty-five days to make an investigation in Germany.

Of course the defendants strenuously objected. They contended that the dilatory tactics of the prosecution violated all fundamental principles of law and that the request for time was an admission on the part of the prosecution that it had caused the defendants to be indicted in 1942, 1943 and 1944 on insufficient evidence; that the defendants had been arrested, obliged to give bond, had to travel long distances to Washington, D. C. for trial, and had to endure a trial for seven and one-half months although the prosecution knew that the evidence was insufficient, in fact that there was no evidence at all; and finally after another eighteen months of stalling, the prosecution wanted to search the world in hope of finding pertinent and material evidence sufficient to present to another trial jury.

Over the objections of counsel the court on March 15, 1946 allowed Rogge's motion "to complete its investigation in Germany" to April 30, 1946 and added: "This is longer than the minimum period requested. But I wish to afford what seems to me beyond question to be ample time, so that further extension will not be requested." Yet the Department of Justice on April 30, 1946 had the hardihood to ask for another forty-five days!

Naturally the defendants objected. On behalf of his client, Attorney St. George wrote to the judge under date of May 6, 1946, the following:

> "I am herewith sending you the position of my client in reference to the last request of the prosecutor in the Sedition cases.
>
> "During the seven and one-half months of the trial, not one scintilla of evidence was introduced by Mr. Rogge or Mr. Burns pertinent to the issue. The claim that the Nazis had a publicly announced program could have been substantiated in a few hours if there ever was such a publicly announced program. There was no such program. Mr. Rogge well knew that there was no such program, so he tried to befuddle the issues by the introduction of a mass of so-called evidence which counsel designated as 'trash'
>
> "I am satisfied that no investigation, no matter how thorough and how long extended, will uncover any relevant evidence. I am disposed, therefore, to let the prosecution have as much rope as possible so that it can never be said that had they been given sufficient time they might have discovered something that would have a bearing upon the case."

On May 18, 1946, the Chief Justice entered a memorandum order in the three Sedition cases stating, among other things, that under the rules of court adopted two months after the mis-trial, "no greater duty is enjoined upon the prosecution to proceed with or to demand a trial than upon the defendants", and overruled all pending motions to dismiss and all pending motions to strike.

Thus, the eighteen months of endeavor by the defendants to have this case either set for trial or dismissed for want of prosecution, all came to naught. The case is in the same position as it was at the time of the death of Chief Justice Eicher. And so, right up to the insertion of this final note, due process of law remains the issue. The record, to the very end, sustains the burden of our analysis that this is a political persecution in flagrant disregard of due process of law.

May law and justice prevail!

"*For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all.*"—Aristotle.

A. M. D. G.

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